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COMMENTS

Employer Sanctions for Hiring Illegal Aliens: A Simplistic Solution to a Complex Problem

I. INTRODUCTION

United States immigration policy over the course of the last 200 years has evolved from one of open arms to one of racial and qualitative restrictions to one of qualitative and quantitative restrictions.¹ These shifts, fueled by racism, domestic economic conditions including an end to war-time labor shortages, and domestic resource limitations, have resulted in an inability to absorb a new wave of immigrants.² Proposals for enforcing immigration restrictions through sanctions against employers who hire undocumented aliens have surfaced periodically since 1951.³

There are an estimated three and one-half to six million⁴ undocumented aliens⁵ living in the United States. While nationals from many

¹ See Salinas & Torres, *The Undocumented Mexican Alien: A Legal, Social and Economic Analysis*, 13 Houston L. Rev. 863, 866-68 (1976). See generally SENATE COMM. ON THE JUDICIARY, 96TH CONG., 2D SESS., SELECTED READINGS ON U.S. IMMIGRATION POLICY AND LAW 436-43 (Comm. Print 1980) [hereinafter cited as SELECTED READINGS].

² Lansing & Alabart, *Reagan Administration Proposals on Immigration: The Problem of the Undocumented Alien in the U.S.*, 13 CAL. W. INT'L L.J. 1, 8 (1983).

³ THE KNOWING EMPLOYMENT OF ILLEGAL IMMIGRANTS: HEARING BEFORE THE SUBCOMMITTEE ON IMMIGRATION AND REFUGEE POLICY OF THE SENATE COMM. ON THE JUDICIARY, 97TH CONG., 1ST SESS. 17 (1981) [hereinafter cited as KNOWING EMPLOYMENT].

⁴ SELECTED READINGS, *supra* note 1, at 5-10; See also Collin, *Immigration Bill Chances Fade*, Chicago Tribune, Oct. 5, 1983, § 1, at 4, col. 1 (charts growth of entire Hispanic population in the United States).

⁵ This comment will use the terms "undocumented" and "illegal" alien interchangeably to refer to aliens who either are in the United States without the permission of the Immigration and Naturalization Service or have violated the conditions of their stay in the United States by working. No derogatory connotation is meant by "illegal." Of course, it should be noted that an alien is not here illegally until so judged in a hearing.

countries reside in the United States as undocumented aliens, approximately 1.5-2.5 million are Mexican.⁶ Although Mexicans represent merely a portion of the illegal flow of immigrants, United States' immigration policy towards Mexico has generally paralleled overall trends.⁷ This comment will therefore focus on them.

This focus does not presuppose that Cubans, Haitians, Asians and others do not illegally immigrate and encounter exploitation and discrimination in the United States.⁸ It also does not overlook the fact that there are many highly skilled Europeans working in this country illegally.⁹ Rather, this focus presupposes that Mexicans are most closely identified with illegal immigration and any attempt to limit their immigration poses the greatest threat of discrimination to United States citizens — especially to those of Hispanic ancestry.¹⁰

Several factors have led to the current push for sanctions against employers who hire illegal aliens. One main factor is the perception that illegal aliens take jobs from United States citizens and legal aliens, workers and negatively affect the national economy. Obviously, any perception that the jobs of United States citizens are being lost tends to create an emotionally charged environment that hampers objective decision making. Further, frustration has built up because current legal mechanisms seem incapable of halting illegal immigration. This frustration has increased xenophobia. Finally, proponents of sanctions identify a major inequity in a law which punishes illegal immigrants but provides no sanctions against their employers. The answer, some say, is to end the "pull" of illegal immigration, i.e. eliminate employment opportunities in the United States by prohibiting employers from hiring illegals.

Although employer sanctions temporarily satisfy an emotional need to do *something* to preserve citizens' jobs from hordes of illegal aliens, they do not permanently address underlying problems. Congress must adopt a more sophisticated approach to illegal immigration and recognize the potential pitfalls of employer sanctions. First, no legislative reform of immigration law can ignore the fact that the economy is

⁶ SELECTED READINGS, *supra* note 1, at 9-10. In 1975, 89% of the illegal aliens arrested were Mexican nationals. Catz, *Regulating the Employment of Illegal Aliens: DeCanas and Section 2805*, 17 SANTA CLARA L. REV. 751, 756 n.32 (1977) (citing an Immigration and Naturalization Service report) [hereinafter cited as Catz].

⁷ See Salinas, *supra* note 1, at 868-73.

⁸ SELECTED READINGS, *supra* note 1, at 20. See also Lansing & Alabart, *supra* note 2, at 2.

⁹ Cf. SELECTED READINGS, *supra* note 1, at 20. For a comparison of how Northern Europe handles its immigration "problem," see generally Gupte, *Germany's Guest Workers*, N.Y. Times, Aug. 19, 1984, 56 (Magazine), at 87.

¹⁰ See generally J. CREWDSON, *THE TARNISHED DOOR* (1983) (profiling the lives of illegal aliens); see also SELECTED READINGS, *supra* note 1, at 77-98.

stratified. There are certain secondary jobs that Americans may be unwilling to perform, e.g. migrant farm labor, but which are important to the United States economy and create a multiplier effect. Until Congress can accurately determine the number of illegal aliens that create or retain certain jobs in the United States as opposed to the number that take them away from United States citizens, legislators are operating in the dark. An effective sanctions program might actually cause a net decrease in available jobs. Second, Congress must understand that while sanctions might theoretically end the "pull" to illegal immigration, some immigration will always result from the "push" of unbearable political and economic conditions in the illegals' home country. Thus, the current employer sanction proposals seem to offer limited hope for accomplishing their purpose and, if successful, might result in consequences which outweigh any benefits. Indeed, prior legislation has failed.

Finally, the most serious consequence of employer sanctions would be the resulting discrimination against legal aliens and United States citizens of Hispanic origin. Some employers would try to avoid any legal liability by refusing work to all foreign-looking applicants. Other employers would use the fear of sanctions as a cover for discrimination against Hispanic Americans. Any national counterfeit-proof identification system instituted to limit this discrimination or make sanctions more effective might not, in fact, be foolproof, might be implemented in a discriminatory fashion or might create a "big brother is watching" syndrome.

Illegal immigration is a divisive issue. In a country comprised of immigrants, prizing free enterprise, and valuing civil liberties, there are no easy answers to the question of immigration reform. Yet, three tenets should guide any search for solutions. First, the dynamics underlying illegal immigration and the consequences of any proposed legislative remedies deserve careful study. Second, legislation should only penalize employers who hire illegal aliens for jobs which legal workers are prepared to take. Third, while the Immigration and Naturalization Service is far from perfect, enforcement of immigration laws should be kept in the agency's hands and not those of private parties. At least the Immigration and Naturalization Service's conduct is subject to public scrutiny and control.

Three observations illustrate the complexity of this issue and the dynamics surrounding it. First, with a few exceptions,¹¹ a private em-

¹¹ The two major exceptions are tax withholding and avoiding child labor under 29 U.S.C. § 212 (1982).

employer is rarely obligated to actively enforce the law.¹² Employer sanctions would, in effect, make employers junior Immigration and Naturalization Service officers. Second, any employer sanction program must be viewed in the context of popular perceptions, political, social, and economic impacts, and other immigration reform.¹³ As a major treatise on the subject has stated, "immigration legislation reflects political policy."¹⁴ Finally, the complexity of assumptions about and the impacts of sanctions have given rise to unique coalitions on both sides of the issue. Groups such as the Mexican American Legal Defense and Educational Fund (MALDEF) and the United States Chamber of Commerce oppose sanctions, but the Reagan administration, the Migrant Farm Workers Union and the National Association for the Advancement of Colored People support the reform.¹⁵

This Comment divides the study of employer sanctions into four integrated components. Section II studies the current liability, or lack thereof, of employers who hire illegal aliens. Given that employers presently face no real liability, Section III next examines arguments in support of employer sanctions and outlines the most recent legislation before Congress. Section IV outlines the effect employer sanctions would have on employers, legal workers, Hispanic Americans and their civil rights, and the national economy. The section ends with a critique of any national identification system that might evolve in an attempt to eliminate the negative consequences associated with employer sanctions. Section V reviews some proposed alternatives to the pending employer sanctions that could better respond to illegal immigration and avoid negative effects.

II. CURRENT STATE OF EMPLOYER LIABILITY: THE LAW AS A PAPER TIGER

A. Existing Immigration Sanctions

Current federal law, 8 U.S.C. § 1324, prohibits any person from assisting in the willful or knowledgeable act of or attempt at concealing, harboring, shielding or inducing entry of an illegal alien into or within the United States.¹⁶ Each violation of this law is a felony that may result

¹² See SELECTED READINGS, *supra* note 1, at 94-121.

¹³ A 1977 Gallup poll found Americans six to one in favor of employer sanctions. Catz, *supra* note 6, at 760 n.55.

¹⁴ C. GORDON & H. ROSENFELD, 1-6 IMMIGRATION LAW AND PROCEDURE (1983).

¹⁵ See generally KNOWING EMPLOYMENT, *supra* note 3.

¹⁶ 8 U.S.C. § 1324(a) (1982). The 1952 Act corrected a statutory ambiguity that had led the United States Supreme Court to find that harboring and concealing were not prohibited. C. GORDON & H. ROSENFELD, *supra* note 14, at 9-52 to -55. This current section is constitutional.

in a maximum fine of \$2,000 and up to five years imprisonment.¹⁷ There is no private right of action under this law.¹⁸

The statute provides that employment, including the usual and normal practices incident to employment, shall not constitute "harboring."¹⁹ Known as the "Texas proviso," this major exception was written into the law in part through the efforts of Texan agricultural interests.²⁰ The legislative intent behind the Texas proviso is somewhat ambiguous. Remarks in the legislative record indicate that once an employer learns an employee is an illegal alien, he is liable notwithstanding the Texas proviso.²¹ But the predominant view holds that while an employer could be liable for violating other aspects of the act, such as the prohibition against transporting illegal aliens into the United States,²² he would not be liable for harboring an illegal alien as part of the employment relationship even if the employee's illegal status was known to him.²³

The courts have held that the Texas proviso does not exempt employers from liability under § 1324, but rather is a clarification of "harboring" and only applies when a defendant tries to establish an affirmative defense that his acts were part of the usual and normal employment process.²⁴ So construed, the Texas proviso is not a blanket shield for employers prosecuted under § 1324.²⁵ A court determines

Herrera v. United States, 208 F.2d 215, 217 (9th Cir. 1954) (the court did not pass on the provision providing that employment does not constitute harboring).

¹⁷ 8 U.S.C. § 1324(a) (1982).

¹⁸ Chavez v. Freshpict Foods, Inc., 456 F.2d 890 (10th Cir. 1972), *cert. denied*, 409 U.S. 1042 (1972).

¹⁹ 8 U.S.C. § 1324(a) (1982). The courts have held that this distinction is based on a rational basis and does not violate equal protection or due process principles. *United States v. Lopez*, 521 F.2d 437, 441-42 (2nd Cir. 1975), *cert. denied*, 423 U.S. 995 (1975).

²⁰ Comment, *Illegal Immigration: Employer Sanctions and Related Proposals*, 19 SAN DIEGO L. REV. 149, 151 n.14 (1981).

²¹ 98 CONG. REC. S794 (Feb. 5, 1952) (statement of Sen. Kilgore of W. Virginia). *See also id.* at S811 (statement of Sen. Magnuson of Washington).

²² *Id.* at S797 (statement of Sen. Kilgore). *See U.S. v. Bunker*, 532 F.2d 1262 (9th Cir. 1976) (example of conviction for transporting illegal aliens across the borders). In the abstract all American employers "induce" illegal immigration by providing the perception that employment opportunities exist in the United States.

²³ 98 CONG. REC. S803 (Feb. 5, 1952) (statement of Sen. Lehman of New York), *see also id.* S806 (statement of Sen. Douglas of Illinois). Sen. Douglas had submitted two amendments to what is now 8 U.S.C. § 1324 (1982) that would have made knowing employment illegal. Both were defeated in the interests of protecting agriculture employers and ensuring the bill's passage. *Id.* S793-813. The Act speaks of active illegality, i.e., concealing, harboring, and inducing, not just knowledge. Comment, *Regulation of Illegal Aliens: Sanctions Against Employers Who Knowingly Hire Undocumented Workers*, 4 W. ST. U.L. REV. 41, 50 (1976). The proviso is broad and unqualified in scope. *Id.* at 50-51.

²⁴ *United States v. Herrera*, 584 F.2d 1137, 1144 (2d Cir. 1978). As a penal statute, § 1324 is strictly construed. *United States v. Orejel-Tejeda*, 194 F. Supp. 140, 143 (N.D. Cal. 1961).

²⁵ *United States v. Winnie Mae Mfg. Co.*, 451 F. Supp. 642, 646-47 (C.D. Cal. 1978) (indictment

whether the employer has acted within the normal incidents of employment by comparing the specific facts with the general practices of employers in the relevant industry.²⁶ The government must prove that the employer substantially facilitated the known illegal alien's stay in the United States.²⁷ For example, in *United States v. Herrera*,²⁸ the government proved that the defendant housed his prostitutes, provided for their possible escape, instructed them to say they were Puerto Ricans, and forewarned them of an Immigration and Naturalization Service raid.²⁹ Similarly, in *United States v. Winnie Mae*,³⁰ the government proved that the employer provided a hiding place for his illegal aliens.³¹

Other sections of the immigration laws narrow the applicability of the Texas proviso. For example, it is a crime for an employer to hire and harbor illegal aliens to act as prostitutes or for other immoral purposes.³² In addition, the immigration laws impose an obligation on transit companies to prevent their employees and customers from using the transit company as a means of facilitating immigration law violations.³³

B. Farm Labor Contractor Sanctions

Congress, in 29 U.S.C. § 1816, has prohibited farm labor contractors from recruiting or employing aliens known to lack Immigration and Naturalization Service permission to work in the United States.³⁴ A contractor may present a good faith defense showing that he relied on appropriate documentation and had no reason to suspect that he had hired an illegal alien.³⁵ But the narrow scope of the prohibition³⁶ and the lack of

was dismissed because key witnesses for the defendants were returned to Mexico before the defendants could interview them, thus denying the defendants their due process rights).

²⁶ *Herrera*, 584 F.2d at 1144; *United States v. Mount Fuji Japanese Steak House, Inc.*, 435 F. Supp. 1194, 1202 (E.D.N.Y. 1977).

²⁷ *Herrera*, 584 F.2d at 1144-45.

²⁸ *Id.* at 1141-50.

²⁹ *Id.*

³⁰ *Winnie Mae Mfg. Co.*, 451 F. Supp. 642.

³¹ *Id.* at 644.

³² 8 U.S.C. § 1328 (1982) (provides that a violation must include the illegal importation of the alien prostitute). *Id.*

³³ 8 U.S.C. § 1286 (1982) (owner or agent of transit vessel may not pay off or discharge an alien crewman without Immigration and Naturalization Service approval); 8 U.S.C. § 1287 (1982) (owner or agent of transit company prohibited from bringing into the United States an alien "crewman" where owner or agent intends to assist the alien in evading immigration laws); 8 U.S.C. § 1323 (1982) (transit Company and its employees liable if either bring into the United States a passenger lacking Immigration and Naturalization Service approval; scienter not required).

³⁴ 29 U.S.C. § 1816(a) (1982). A "farm labor contractor" is a person other than an agricultural employer or association, who, for consideration, contracts farm labor). 29 U.S.C. § 1802(7) (1982).

³⁵ 29 U.S.C. § 1816(b) (1982).

³⁶ 29 U.S.C. § 1816 (1982) only applies to one type of employer in one field of commerce. Fur-

enforcement efforts³⁷ have resulted in no prosecutions under § 1816.³⁸

C. State Sanctions

Sanctions against employers who hire illegal aliens exist in at least 11 states.³⁹ California has the best known of these statutes. It provides that "no employer shall knowingly employ an alien who is not entitled to lawful residence in the United States if such employment would have an adverse effect on lawful workers."⁴⁰ Violators face \$200-\$500 fines and additional civil actions⁴¹ such as private tort claims for unfair competition and interference with employment rights.⁴² Until recently, the United States Supreme Court prohibited state regulation over immigration and viewed it as part of foreign commerce over which Congress had exclusive control.⁴³ In 1976, the Supreme Court modified this position and upheld the California employer sanctions statute.⁴⁴

ther, many contractors of farm labor are excluded from its provisions. *E.g.*, 29 U.S.C. § 1803 (1982) (exempts family businesses, many small businesses, common carriers, labor organization and part-time agricultural employers or association contractors).

³⁷ See KNOWING EMPLOYMENT, *supra* note 3, at 141 (statement of J. Otero, Vice-Chairman of the Labor Council for Latin American Advancement ("LCLAA")).

³⁸ There seem to be no recorded cases relying on 29 U.S.C. § 1816 (1982) even though its language could be construed as providing a private right of action. See 29 U.S.C. § 1816(a) (1982) ("No farm labor contractor shall recruit, hire, employ, or use, with knowledge, the services of any individual who is an alien not lawfully admitted for permanent residence or who has not been authorized by the Attorney General to accept employment"). While one source cites figures of 10,190 illegal aliens apprehended, 370 contractors charged and \$1,407,650 in damages attributable to the Act's enforcement, these figures probably cover all the Act's provisions. KNOWING EMPLOYMENT, *supra* note 3, at 41-42.

³⁹ CAL. LAB. CODE § 2805 (West Supp. 1984); 31 CONN. GEN. STAT. ANN. § 51k (West Supp. 1984); DEL. CODE ANN. tit. 19, § 705 (1979); FLA. STAT. ANN. § 448.09 (West 1981); KAN. STAT. ANN. tit. 21, § 4409 (1981); ME. REV. STAT. ANN. tit. 26, § 871 (West Supp. 1932); MASS. GEN. LAWS ANN. ch. 39, § 2-305 (West 1981); N.H. REV. STAT. ANN. § 275-A:4a (1979 Supp); VT. STAT. ANN. tit. 21, § 444a (1978); VA. CODE § 40.1-11.1 (1981).

⁴⁰ CAL. LAB. CODE § 2805(a) (West Supp. 1984).

⁴¹ *Id.* § 2805 (b)-(c).

⁴² Comment, *supra* note 23, at 59-60; see Catz, *supra* note 6, at 774; cf. Larez v. Oberti, 23 Cal. App. 3d 217, 100 Cal. Rptr. 57 (1972) (Class action by resident farm workers against farm operator and labor contractor for unfair competition, interference with employment, and violations of the Immigration and Nationality Act.)

[T]he interference count failed because the plaintiffs did not establish the certainty of their employment. [T]he plaintiffs also failed to prove conspiracy. [T]he state court found an injunctive remedy inappropriate here for the following reasons: only a federal court can imply a remedy based on a federal statute, federal action would be more appropriate, policy dictated against equitable relief, and § 2805 would provide possible relief in the future.

Id.

⁴³ C. GORDON & H. ROSENFELD, *supra* note 14, at 1-33 to -37.

⁴⁴ In *Dolores Canning Co. v. Howard*, 40 Cal. App. 3d 673, 115 Cal. Rptr. 435 (1974), the court found that Cal. Lab. Code § 2805 interfered with Congress' exclusive right to regulate immigration, that § 2805 was void for vagueness, and fell outside state police powers. *But cf.* *Decanas v. Bica*, 424 U.S. 351 (1976), where the Court distinguished between an immigration rule and state regulation

Employer sanctions in California and other states have been ineffective, perhaps due to their low enforcement priority among police and to confusion surrounding what constitutes a good faith attempt at compliance.⁴⁵ In the absence of a clear understanding of when any employer has violated the law and is without a defense, police are hesitant to prosecute. Further, the need for uniform federal laws seems evident given the interstate nature of illegal labor movements. Many states, even ones with their own sanctions, seem to be counting on federal employer sanctions to discourage employment of illegals.⁴⁶

D. Related Federal Laws

Employers presently face a battery of federal laws regulating employer-employee relations: the Fair Labor Standards Act;⁴⁷ minimum wage requirements;⁴⁸ safety requirements;⁴⁹ various unemployment, social security and federal tax provisions;⁵⁰ and the certification process for alien workers.⁵¹ Many assume that illegal aliens are employed primarily because they are willing to work for below minimum wage and under unsafe conditions.⁵² If such is the case, enforcement of existing labor laws will end employers' incentive to hire illegal aliens because illegals'

that has only an indirect effect on immigration and that supplements federal law. *DeCanas v. Bica*, 424 U.S. 351 (1976). In *Decanas*, migrant farm workers had sued farm labor contractors who refused them employment because the contractor had already hired known illegals. *Id.* at 353. The Court upheld state employer sanctions as long as they were not preempted by Congressional legislation. *Id.* at 357. Inexplicably, California has yet to use *Decanas* to overturn *Delores*, so § 2805 lies legally dormant. Catz, *supra* note 6, at 766-67; Kutchins & Tweedy, *No Two Ways About It: Employer Sanctions versus Labor Law Protections for Undocumented Workers*, 5 INDUS. REL. L.J. 339, 349 (1983).

⁴⁵ A 1980 Government Accounting Office report, *ILLEGAL ALIENS: ESTIMATING THEIR IMPACT ON THE UNITED STATES*, found that out of 11 states, only one \$250 fine had resulted from employer sanctions and only two other cases were then pending. *KNOWING EMPLOYMENT*, *supra* note 3, at 146. As a result of little experience in using the sanctions, a lack of information, low law enforcement priority, and a lack of funding, all the sanctions lack utilization. *Id.* at 145-46.

⁴⁶ *Id.*

⁴⁷ Fair Labor Standards Act of 1938, 29 U.S.C. §§ 201-219 (1982).

⁴⁸ 29 U.S.C. § 206 (1982).

⁴⁹ 29 U.S.C. §§ 651-678 (1982).

⁵⁰ 26 U.S.C. §§ 3101-3507 (1982); see *Gates v. Rivers Construction Co.*, 515 P.2d 1020 (Ala. 1973) (a Canadian, whose wages were placed in a trust until he obtained a visa pursuant to his contract, should receive his wages when he obtains a visa even though the contract is illegal).

⁵¹ 8 U.S.C. § 1184 (1982). To give the law teeth and stop the mockery of having employer violators just rehire another illegal alien, the Department of Labor currently suspends an employer's labor certification for three years. There are possible due process problems here. See Flicker & Vazzana, *Labor Aspects of Immigration Law* 36-41, 1969 PRACTICING LAW INSTITUTE, Corporate Law and Practice, Transcript Series No. 4.

⁵² See *infra* notes 333-35 and accompanying text.

labor will cost no less than legal residents' labor.⁵³ Currently, effective enforcement seems to be lacking,⁵⁴ hence the call for employer sanctions either as a substitute for or supplement to existing laws.⁵⁵

Ironically, worker protection statutes and court decisions also protect illegals to some degree. Employers may be found liable to employees for breach of contract and to the National Labor Relations Board for unfair labor practices even when the employees involved are illegal aliens facing deportation.⁵⁶ An admittedly deportable alien, who sues for breach of an employment contract, must be granted a stay of deportation in order to pursue his contract claim.⁵⁷ Further, one commentator has noted that "workers who lack papers may nevertheless form and join unions, elect bargaining representatives and enforce minimum wage, maximum hour, and occupational safety and health statutes," since courts "assert that extending these protections serves both to implement the policies of the Labor Act and to prevent substitution of undocumented workers for legal workers. . . ."⁵⁸

For example, in *Amay's Bakery and Noodle Co.*,⁵⁹ the company discharged several undocumented workers who had participated in a successful attempt to install Teamsters Local 630 as their collective

⁵³ See *infra* notes 346-47.

⁵⁴ KNOWING EMPLOYMENT, *supra* note 3, at 42-43 (Sen. Kennedy noting the lack of enforcement of existing labor laws and calling for increased use of these laws instead of new employer sanctions.); see *infra* notes 346-47. However, the Department of Labor's Employers of Undocumented Workers Program is using 260 officers to enforce the Fair Labor Standards Act against companies with low wages and high turnover. Since mid-1978, the program has uncovered \$3.7 million in wage law violations. Pandya, Berzinsaki, & Parker, *Illegal Immigration: An Alternative Perspective* (1981) (paper submitted by Georgetown University Institute for Public Policy) [hereinafter cited as KNOWING EMPLOYMENT — ALT. PERSP.], reprinted in KNOWING EMPLOYMENT, *supra* note 3, at 322, 353-54. For a further evaluation of the effectiveness of Employers of Undocumented Workers, the referrals to Immigration and Naturalization Service, and the potential for improvements, see *infra* notes 353-55. The Immigration and Naturalization Service claims success in operating "operation cooperation," where employers voluntarily allow the Service to pre-screen and refer applicants. KNOWING EMPLOYMENT, *supra* note 3, at 3-5 (testimony of Doris Meissner, Acting Commissioner, Immigration and Naturalization Service).

⁵⁵ See *infra* notes 81-88 and accompanying text.

⁵⁶ See *infra* notes 317-23 and accompanying text for a discussion of how employer sanctions could end this liability. Minimum wage and Occupational Safety and Health Act standards do apply to undocumented aliens (unless the worker is involved in certain restaurant work or wage-by-item picked work found in agriculture). KNOWING EMPLOYMENT, *supra* note 3, at 97-98.

⁵⁷ *Hong v. Agency For Int'l Dev.*, 470 F.2d 507 (9th Cir. 1972) (there is no need to exhaust administrative appeals where the alien admits his illegal status and his claim is outside Immigration and Naturalization Service jurisdiction); cf. *Bolanas v. Kiley*, 509 F.2d 1023 (2d Cir. 1975) (plaintiff seeking to enjoin his deportation because of an intended civil rights suit against the New York City Police Dept. was denied; deportation enjoined only in extraordinary circumstances).

⁵⁸ Kutchins & Tweedy, *supra* note 44, at 341.

⁵⁹ 227 N.L.R.B. 214, 94 L.R.R.M. 1165 (1976).

bargaining agent.⁶⁰ Here, the administrative law judge ordered the company to stop harassing the union.⁶¹ In addition, the National Labor Relations Board on review found that California Labor Code § 2805 did not preclude a reinstatement with backpay for all discharged employees.⁶²

Moreover, in *Sure-Tan, Inc. v. National Labor Relations Board*,⁶³ the Court found that the Board's power to certify a collective-bargaining representative and provide certain remedies for constructive discharges applies to employers of illegal aliens.⁶⁴ The Court first held that illegal aliens, who cast the majority of votes electing the union, were "employees" under the Labor Act and eligible to vote because the Act did not exclude aliens and because the National Labor Relations Board had a long standing policy of including them.⁶⁵ The Court noted that the Immigration and Nationality Act did not contain employer sanctions.⁶⁶ The Act does not explicitly prohibit undocumented aliens from voting and working in Board elections.⁶⁷ The Court observed that illegal alien employees can depress working conditions for citizens and legal aliens and decrease the effectiveness of unions.⁶⁸ But, "[i]f an employer realizes that there will be no advantage under the N.L.R.A. in preferring illegal aliens to legal resident workers, any incentive to hire such illegal aliens is correspondingly lessened" and thus the incentive to enter the United States illegally is lessened.⁶⁹

Finally, the Court upheld a National Labor Relations Board finding that an employer's sending of a letter to the Immigration and Naturalization Service requesting a check of his employees' status, when done only in retaliation for union organizing, constitutes constructive discharge and an unfair labor practice if it results in deportation.⁷⁰ The Court held that the discharged illegal alien employees were entitled to reinstatement, subject to the condition that reinstatement would not make *Sure-Tan, Inc.*

⁶⁰ *Id.*

⁶¹ *Id.*

⁶² *Id.*

⁶³ *Sure-Tan, Inc. v. National Labor Relations Board*, 104 S. Ct. 2803 (1984) (plurality opinion) (remanded for appropriate remedial order by the National Labor Relations Board).

⁶⁴ *Id.*

⁶⁵ *Id.* at 2808-09.

⁶⁶ *See id.* at 2809.

⁶⁷ *National Labor Relations Board v. Sure-Tan, Inc.*, 583 F.2d 355, 359 (7th Cir. 1978), *modified*, 104 S. Ct. 2803 (1984). Following past practice, the Court of Appeals found that the union voted in by the *Sure-Tan, Inc.* workers still represented the employees even though a majority or the workers who voted for the union had been deported. *Id.* at 361.

⁶⁸ *Sure-Tan, Inc.*, 104 S. Ct. at 2809.

⁶⁹ *Id.* at 2810.

⁷⁰ *Id.* at 2806, 2810-11 (the court made note of the employers previous knowledge of his employees' illegal status, which was not brought out until after the election).

liable under immigration law or result in the discharged employees' reclaiming their jobs as illegal aliens.⁷¹ The Court rejected the Court of Appeals modification of the Board's order that had provided for the Board to require the employer to draft the reinstatement offers in Spanish, ensure verification of receipt, and keep the offers open for four years.⁷² The Court severely limited back pay by making it applicable only to the time in which the discharged employees were "available" for work, i.e., legally admitted into the United States.⁷³ The Court of Appeals had held that the policies of the National Labor Relations Act would be best carried out if minimum back pay awards were made for the period that employees might reasonably have remained employed without independent Immigration and Naturalization Service apprehension, i.e., six months.⁷⁴ The Supreme Court rejected this remedy on three grounds: that it impermissibly substituted a judicial judgment for the Board's determination as to how best to effectuate National Labor Relations Act policy, that it provided a back pay remedy for a speculative injury, and that it provided back pay to employees who were not legally available for work.⁷⁵ The Court acknowledged that this reversal eliminated the most potent remedies and penalties under the National Labor Relations Act, but it pointed out that the cease and desist order still stood and could be enforced through contempt proceedings.⁷⁶ The Court held that any deficiencies in the Act's enforcement mechanism needed Congressional correction.⁷⁷

In sum, the law's current ambiguity and ambivalence, combined with its ineffectiveness, has created the need for reform.

⁷¹ *Id.* at 2815.

⁷² *Id.* at 2816.

⁷³ *Id.* at 2815.

⁷⁴ *Id.* at 2808.

⁷⁵ *Id.* at 2812-15. The dissent maintained that the National Labor Relations Board had fully acquiesced in the Court of Appeals remedy and so the Court should apply a deferential standard in reviewing the remedy. *Id.* at 2817-20 (Brennan, J. dissenting). The Court should defer to the Board's reasonable estimation of the proper back pay award along with the policy of forgiving periods of unavailability that are due to the illegal conduct of the employer. *Id.* at 2818 (Brennan, J. dissenting). Finally, "Once employers, such as petitioner, realize that they may violate the N.L.R.A. with respect to their undocumented alien employees without fear of having to recompense those workers for lost pay, their incentive to hire such illegal aliens' will not decline, it will increase." *Id.* at 2819 (Brennan, J. dissenting).

⁷⁶ *Id.* at 2815-16 n.13.

⁷⁷ *Id.*

III. PENDING LEGISLATION: BRINGING ALICE OUT OF WONDERLAND?

A. Policy Arguments

The arguments cited in Congress for imposing civil and criminal penalties against employers who hire undocumented workers fall into four categories: philosophical, pragmatic, economic, and social.

Senator Simpson of Wyoming, the Senate's principal sponsor of employer sanctions, has cited as inequitable the legal inconsistency in the current law which makes it illegal for an undocumented alien to work in the United States but imposes no penalty on the employer who hires him.⁷⁸ Furthermore, Senator Simpson identifies as a serious problem the fact that "we [are] no longer able to fulfill the first duty of a sovereign nation: control of our borders."⁷⁹ Finally, the Wyoming Senator has asked rhetorically:

[H]ow are we ever going to enforce laws on our books when it is legal for an employer to hire an illegal but it is illegal for the illegal to work? You can not bring Alice out of Wonderland when you have a law on the books of the United States like that.⁸⁰

Employer sanctions' opponents argue that sanctions are based only on a sense of symbolism: "a need to do *something* even if there is little chance of the proposal having any real effect."⁸¹ One Reagan administration official is said to have explained the support for employer sanctions as an effort to "create an image of control."⁸² Opponents also argue that if employer sanctions fail, disrespect for the law will only increase.⁸³

It is the current immigration and labor law's failure to stem the tide of illegal immigration that has caused the movement for employer sanctions.⁸⁴ Sanctions' advocates contend that the Immigration and Naturalization Service needs more than just border patrols and spot raids to end illegal immigration and employment because employers depend on a flow of new illegal alien employees to replace those deported.⁸⁵ They also assert that labor law enforcement is no answer for those illegal aliens

⁷⁸ 129 CONG. REC. S6918 (daily ed. May 18, 1983).

⁷⁹ Simpson, *Immigration Reform and Control*, 34 LAB. L.J. 195 (1983).

⁸⁰ 129 CONG. REC., *supra* note 78, at S6918.

⁸¹ Remis & Parker, *Cost-Benefit Analysis of President Reagan's Employer Sanctions Proposal* (1981) (paper submitted by Georgetown University Institute for Public Representation) [hereinafter cited as KNOWING EMPLOYMENT — COST BENEFIT] *reprinted in* KNOWING EMPLOYMENT, *supra* note 3, at 252.

⁸² *Id.*

⁸³ KNOWING EMPLOYMENT, *supra* note 3, at 230-231 (testimony of D. Parker).

⁸⁴ See *supra* notes 36-38, 45, 54 and accompanying text.

⁸⁵ KNOWING EMPLOYMENT, *supra* note 3, at 3 (testimony of Doris Meissner of the Immigration and Naturalization Service).

taking well paying American jobs.⁸⁶ In sum, the primary argument for sanctions rests fundamentally on ending the “pull” of illegal immigration.⁸⁷

Employment is the magnet that attracts aliens here illegally or, in the case of nonimmigrants [visiting aliens, e.g., students], leads them to accept employment in violation of their status. Employers will be deterred by such a Federal law from hiring unauthorized aliens and thus, in turn, will deter aliens from entering illegally or violating their status in search of employment.⁸⁸

Sanctions’ proponents rely, in large part, on the controversial assumption that undocumented aliens take jobs away from Americans and that sanctions will effectively restore these jobs.⁸⁹ Illegal workers are estimated to displace anywhere from 50,000 legal workers at a cost to the United States of \$350 million a year⁹⁰ to approximately one million legal workers at a cost to the United States of \$30 billion a year.⁹¹ Further, studies indicate that illegal workers decrease wages and lower working conditions of United States citizens.⁹² It is because undocumented workers fear deportation and because they face such bleak conditions in their home country that employers can so easily exploit them.⁹³ Many proponents of sanctions say that without illegal workers to exploit, employers will have to increase wages and improve job conditions⁹⁴ to the benefit of America’s most vulnerable workers: minorities and those with few skills.⁹⁵ In addition, employers will no longer have the legal option of

⁸⁶ See *infra* notes 328-29, 356-60, 373-79 and accompanying text.

⁸⁷ The minimum wage in the United States is up to 10 times greater than the comparable wage in Mexico, a country with very high unemployment. H.R. REP. DOC. NO. 115.1, 98th CONG., 1st Sess. 95 (1983) (Department of Labor testimony); See generally text accompanying note 345 [hereinafter cited as H.R. REP. NO. 115.1].

⁸⁸ H.R. REP. NO. 115.1, *supra* note 87. See *infra* notes 324-45 and accompanying text for a full discussion of the arguments in support of and against this key assumption.

⁸⁹ See KNOWING EMPLOYMENT, *supra* note 3, at 8; see generally *infra* notes 328-32 and accompanying text.

⁹⁰ KNOWING EMPLOYMENT, *supra* note 3, at 53-54 (testimony of L. Fuchs, former executive director of the Select Committee on Immigration).

⁹¹ *Id.* at 69. (testimony of R. Oswald, Director, Department of Economic Research, AFL-CIO). This estimate is based in part on the fact that the Immigration and Naturalization Service apprehended almost one million illegal aliens in 1980. *Id.* at 72.

⁹² *Id.* at 220. (testimony of D. North, New Transcentury Foundation). Testimony cited the severe impact on Americans’ job opportunities in areas bordering Mexico; Salinas, *supra* note 1, at 876-78.

⁹³ See Salinas & Torres, *supra* note 1, at 865.

⁹⁴ See KNOWING EMPLOYMENT, *supra* note 3, at 179-80 (testimony of M. Cooper of the National Urban League). Also, employers no longer will be able to pocket the wages of deported aliens. See Catz, *supra* note 6, at 754-55.

⁹⁵ KNOWING EMPLOYMENT, *supra* note 3, at 21 (testimony of M. Lovell, Under Secretary, Department of Labor).

using undocumented aliens as strike breakers.⁹⁶ Finally, proponents of sanctions argue that effective sanctions will stop the unfair competition now imposed against employers hiring only legal workers and employing them under non-exploitative conditions.⁹⁷

Proponents of sanctions maintain that sanctions that decrease the number of illegal workers also will improve the United States' macro economy and decrease government deficits.⁹⁸ Their argument is multi-fold. First, many undocumented workers fail to pay income taxes, resulting in a loss of at least \$115 million annually in government revenue.⁹⁹ Second, undocumented aliens send much of their pay to their homeland resulting in balance of payment problems for the United States.¹⁰⁰ Third, undocumented workers directly cost government agencies money for various social services that they utilize and indirectly cost more money in welfare and unemployment benefits to displaced legal workers, estimated to cost \$.7 billion annually in additional unemployment compensation.¹⁰¹

Proponents of sanctions also maintain that a sanction program that is perceived as effective could decrease xenophobia in the United States.¹⁰² They reason that Americans would no longer suspect legal aliens and Hispanic Americans of being undocumented aliens.¹⁰³ Further, some advocates argue that effective sanctions could assist the assimilation of Hispanic Americans into society's mainstream¹⁰⁴ by reinforcing "American" traditions and the use of the English language.¹⁰⁵ Finally, some proponents maintain that if sanctions were combined with amnesty for many illegals now in the United States, current exploitation might end because current illegal workers could assert their legal rights without

⁹⁶ Salinas & Torres, *supra* note 1, at 883.

⁹⁷ KNOWING EMPLOYMENT, *supra* note 3, at 68 (AFL-CIO testimony).

⁹⁸ See Salinas & Torres, *supra* note 1, at 876.

⁹⁹ *Id.* at 880. The figure is given in 1976 dollars. *Id.*

¹⁰⁰ *Id.* at 880, 879-80.

¹⁰¹ H.R. REP. NO. 115.1, *supra* note 87, at 97 (Department of Labor testimony). Of course, illegal aliens may become a greater burden on government agencies if they remain in the United States without finding work because of the sanctions.

¹⁰² KNOWING EMPLOYMENT, *supra* note 3, at 24; Salinas, *supra* note 1, at 881; *cf. infra* notes 221-35 and accompanying text.

¹⁰³ *Cf.* Chicago Tribune, Feb. 22, 1984, at 1, col. 1 (immigration officer deports a 14-year-old American Hispanic after allegedly ignoring his offer of proof of legal residences and after fearful boy signed a waiver of his rights).

¹⁰⁴ Salinas & Torres, *supra* note 1, at 882.

¹⁰⁵ See *Id.*; KNOWING EMPLOYMENT, *supra* note 3, at 54 (testimony of L. Fuchs). This argument assumes that there are "mainstream" American values and that maintaining the Hispanic tradition is undesirable for Hispanics and Americans. If a constant stream of Mexican immigrants reinforces Hispanic traditions and political awareness, this may have positive consequences for Hispanic Americans.

fear of deportation¹⁰⁶ and increase their voting strength.¹⁰⁷

B. The Provisions of Current Sanction Legislation

The latest Congressional attempt to impose employer sanctions, part of the Immigration and Reform Act of 1983,¹⁰⁸ is far from the first.¹⁰⁹ Sponsored by Senator Simpson and Representative Mazzoli and supported by the Reagan Administration, the legislation got off to a strong start with a 76-18 approval in the Senate in May 1983.¹¹⁰ Notwithstanding House Speaker O'Neill's initial attempt to keep the bill in committee and off the House floor,¹¹¹ the House approved the bill 216-211 on June 20, 1984.¹¹² The bill died when House and Senate conferees could not resolve their differences before the October 1984 recess,¹¹³ but the bill will be resurrected in the upcoming session.¹¹⁴ The constitutional power to enact such legislation, however, has never been seriously questioned because

the Supreme Court [has consistently] pointed out it was possible to imply the power to regulate immigration from the specific directives in the Constitution to regulate foreign commerce, to declare war, to make treaties, to establish a uniform rule of naturalization, to prohibit the importation of persons, [and] to make all necessary and proper laws.¹¹⁵

Employer sanctions are simply an extension of Congress' power to exclude aliens who negatively affect American labor.¹¹⁶ The Simpson-Mazzoli bills contain a package of reforms to the Immigration and Nationality Act.¹¹⁷ The provisions imposing employer sanctions should be viewed in terms of the entire reform package because the elements com-

¹⁰⁶ KNOWING EMPLOYMENT, *supra* note 3, at 44-45 (opening statement of Sen. Kennedy).

¹⁰⁷ See Salinas & Torres, *supra* note 1, at 883.

¹⁰⁸ S529, 98th CONG., 1st SESS. (1983) (Simpson bill); H.R. 1510, 98th CONG., 1st SESS. (1983) (Mazzoli bill).

¹⁰⁹ See *supra* text accompanying note 3.

¹¹⁰ Wall St. J., Oct. 4, 1983, at 7, col. 1 (midwest ed.).

¹¹¹ *Id.* Some reasons for the Speaker's actions may include strong opposition from Hispanic groups, a key Democratic constituency, and the threat of a veto from President Reagan for cost containment or purely political reasons. *Id.*

¹¹² N.Y. Times, June 21, 1984, at 1, col. 6.

¹¹³ Telephone interview with staff of Senate Subcommittee on Immigration and Refugee Policy of Senate Committee on the Judiciary (Oct. 18, 1984) [hereinafter cited as Interview].

¹¹⁴ *Id.* (Senator Simpson has already promised to introduce his bill in the next Congress).

¹¹⁵ C. GORDON & H. ROSENFELD, *supra* note 14, at 1-34; *cf.* INS v. Chadha, 51 U.S.L.W. 4907 (U.S. June 23, 1983) (No. 80-1832, 2170, 2171) (a legislative veto used to overrule administrative agency or executive department actions is an unconstitutional violation of separation of powers but the legislative veto provision of the Immigration and Nationality Act was severable).

¹¹⁶ Comment, *The Right of Undocumented Aliens Against Their Employers*, 10 FORDHAM URBAN L.J. 683, 687 (1982) (citing 8 U.S.C. § 1182 labor certification provisions).

¹¹⁷ See 129 CONG. REC., *supra* note 78, S6970-6986 for Senate version that requires illegal aliens to have entered the United States prior to January 1980 to have a chance of becoming legalized

plement each other.¹¹⁸ The House version makes the following amendments in addition to employer sanctions:¹¹⁹

- Section 102 extends criminal penalties for falsification of immigration-related documents to include specific pieces of identification and provides criminal penalties for the knowing use of false identification to satisfy employment verification and increases fines.¹²⁰
- Section 113 provides for the option of alien user fees to cover border facility expenses.¹²¹
- Section 121 provides an expedited process for excluding aliens admission into the United States.¹²²
- Section 107 creates a United States Immigration Review Board and a system of Administrative Law Judges below it.¹²³ The Board will review fines and other matters but not overturn an Administrative Law Judge's finding of fact unless it is unsupported by "reasonable, substantial, and probative evidence in the whole record."¹²⁴
- Sections 123 and 124 contain procedures for considering and reviewing asylum applications.¹²⁵
- Section 211 creates a separate H-2 temporary worker program and transitional agricultural worker program whereby the Secretary of Labor considers applications for laborers and assesses whether domestic labor is unavailable or will be negatively affected by foreign labor.¹²⁶ The Secretary also ensures that temporary workers will not be used as strike breakers before issuing certification.¹²⁷ The Attorney General must establish documents for temporary employees to present to employers and the documents must reference any limits on the alien's temporary work status.¹²⁸ The Secretary of Labor may impose civil monetary penalties against employers to assure compliance.¹²⁹
- Section 245 allows the Attorney General to grant "permanent resident alien" status to illegal aliens who establish that they had entered the United States prior to January 1, 1982 and have resided continuously in the United

aliens. Also, the Senate version restricts aliens' eligibility for federal assistance to a greater degree than the House version. *Id.*

¹¹⁸ For a survey of variations in past reform legislation, see Smith & Mendez, *Employer Sanctions and Other Labor Market Restrictions on Alien Employment: The "Scorched Earth" Approach to Immigration Control*, 6 N.C. J. INT'L L & COM. REG. 19, 19-31 (1980).

¹¹⁹ H.R. REP. NO. 115.1, *supra* note 87, at 1-30 (text of H.R. 1510). Here, the "House version" means the bill as reported out by the Committee on the Judiciary of the House on May 13, 1983. Key departures from the bill enacted by the full House on June 20, 1984 are indicated in the text.

¹²⁰ *Id.*

¹²¹ *Id.*

¹²² *Id.*

¹²³ *Id.*

¹²⁴ *Id.*

¹²⁵ *Id.*

¹²⁶ *Id.*

¹²⁷ *Id.*

¹²⁸ *Id.*

¹²⁹ *Id.*

States since then and without having any felony convictions.¹³⁰ Under the bill actually passed by the full House, such undocumented aliens would be legal temporary residents for two years and then become permanent residents if they were studying English and United States history and government.¹³¹ For five years after permanent resident status, these legalized aliens are not eligible for most federal financial assistance except old age, blindness, disability or emergency medical coverage.¹³²

- Sections 201-205 and 210 reform legal immigration by setting new numerical quotas, changing certain rules governing the classification of aliens and requiring regular presidential reports on the impacts of immigration.¹³³
- Section 114 restricts warrantless entry into the fields by the Immigration and Naturalization Service in searching for illegal aliens in outdoor agricultural operations.¹³⁴
- Sections 274(A),(C),(G); 303 provide states with funding to help offset the costs of the program and require the preparation of certain reports to Congress.¹³⁵

The Senate's Simpson bill generally tracts the above provisions with two exceptions. First, the Senate does not describe the new United States Immigration Board as an independent agency of the Justice Department.¹³⁶ Second, the Senate provides for permanent resident status to all illegal aliens who entered the United States before January 1, 1977 and temporary resident status changing in three years to permanent resident status to all illegal aliens arriving in the United States between January 1, 1977 and December 31, 1979.¹³⁷

The Senate's version of employer sanctions, which is similar to the House version, proposes making the following amendments to the Immigration and Nationality Act:¹³⁸

- Section 274A makes it unlawful for any person to hire or recruit for consideration an alien that he knows is not authorized to work in the United States.¹³⁹ An employer who knows that an employee hired after the Act has now become illegal must dismiss the worker.¹⁴⁰ All employers except those with three or less employees, when hiring any new employee, must attest that they have examined the individual's United States passport, social security card or United States birth certificate, and alien employment

¹³⁰ *Id.*

¹³¹ H.R. 1510, 98th Cong., 2d Sess., 130 CONG. REC. 6166-85 (1984) [hereinafter cited as H.R. 1510].

¹³² H.R. REP. NO. 115.1, *supra* note 87, at 1-30.

¹³³ *Id.*

¹³⁴ *Id.*

¹³⁵ *Id.*

¹³⁶ S529, 98th Cong., 1st Sess., 129 CONG. REC. 6970-86 (1983).

¹³⁷ *Id.*

¹³⁸ *Id.* at 6970-72 (text of section 274A of § 529). The Simpson-Mazzoli bill would be inserted after or amend 8 U.S.C. 1324 (1982). *Id.*

¹³⁹ *Id.*

¹⁴⁰ *Id.*

eligibility card or driver's license.¹⁴¹ Employers must attest that the applicant is legally eligible for employment and retain a copy of that record.¹⁴² If the identification reasonably appears on its face to be genuine, then the employer has complied and established a good faith affirmative defense.¹⁴³ After three years, the President is authorized, subject to a legislative veto, to institute a form of fraud-proof identification that shall be limited in use for implementing this scheme of employer verification.¹⁴⁴

- Section 274A also states that violations of the prohibition against hiring unauthorized aliens will result in a civil penalty of \$1,000 per illegal alien for first offenders and \$2,000 per illegal alien thereafter.¹⁴⁵ Where a pattern or practice of violations is established over 18 months and the employer receives notice, then the employer faces a \$1,000 fine per undocumented worker and up to 6 months imprisonment per illegal alien.¹⁴⁶ The Attorney General may also request equitable relief.¹⁴⁷ Failure simply to go through applicant screening procedures can result in a fine of \$500 per individual.¹⁴⁸

- Section 274A requires that before any fines are assessed, the employer receive notice, an opportunity for an administrative hearing and, in the suit to collect the fine, judicial review by a federal district court that will uphold the administrative decision if supported by substantial evidence on the record as a whole.¹⁴⁹

- Section 274A also explicitly pre-empts state employer sanctions,¹⁵⁰ requires presidential monitoring,¹⁵¹ delays implementation,¹⁵² orders the Attorney General to disseminate information on the law,¹⁵³ eliminates duplicative penalties in the Farm Labor Contractors Act,¹⁵⁴ and makes a disclaimer that the Equal Employment Opportunity Commission is not limited by the bill.¹⁵⁵

There are five key differences between the House version imposing employer sanctions and the Senate version.¹⁵⁶ First, in the House version, the Attorney General must establish a method to validate the social security number of employment applicants, e.g., a toll free number that

¹⁴¹ *Id.*

¹⁴² *Id.*

¹⁴³ *Id.*

¹⁴⁴ *Id.*

¹⁴⁵ *Id.*

¹⁴⁶ *Id.*

¹⁴⁷ *Id.*

¹⁴⁸ *Id.*

¹⁴⁹ *Id.*

¹⁵⁰ *Id.*

¹⁵¹ *Id.*

¹⁵² *Id.*

¹⁵³ *Id.*

¹⁵⁴ *Id.*

¹⁵⁵ *Id.*

¹⁵⁶ It is not the intent to have sanctions apply to "casual hiring" where no employer-employee relation exists. H.R. REP. NO. 115.1, *supra* note 87, at 1-13.

employers can call to confirm social security numbers. This will provide a method for employers to achieve complete immunity.¹⁵⁷ Second, the bill passed by the House prohibits discrimination by employers against United States citizens or legal aliens based on national origin or alien status.¹⁵⁸ Third, the House version specifically repeals the Texas proviso.¹⁵⁹ Fourth, in the House version Administrative Law Judges, as opposed to just existing immigration officers,¹⁶⁰ are specifically provided for throughout the proceedings. Fifth, the House bill provides for a six-month, in contrast to the Senate's twelve-month, transition period before penalties become effective.¹⁶¹ But the House only provides for a warning after a first offense and never imposes criminal sanctions.¹⁶²

The House-Senate conferees could resolve only some of the differences between the two Immigration Reform Act bills. The conferees accepted the Senate version of employment sanctions including the provision for criminal penalties.¹⁶³ They compromised by allowing only a warning for an employer's first offense during the first two and one-half years after enactment.¹⁶⁴ They also applied the sanctions to all employers, even those of three or fewer workers, although these employers had no reporting responsibilities.¹⁶⁵ The conferees compromised on the amnesty provisions, providing for permanent resident status to all illegal aliens in the United States prior to 1977 and temporary resident status to all undocumented aliens arriving in the United States prior to 1981.¹⁶⁶ But Senate conferees refused to accept the House provision extending protection against discrimination to legal aliens and providing for a special Counsel at the United States Immigration Board to police discrimination of employers of four to fourteen workers.¹⁶⁷ The House conferees could not agree with the Senate's reimbursement plan to states implementing the Act because the Senate provided less than 100% reimbursement.¹⁶⁸

¹⁵⁷ H.R. 1510, *supra* note 131.

¹⁵⁸ *Id.*; see *infra* note 288 and accompanying text.

¹⁵⁹ H.R. REP. NO. 115.1, *supra* note 87, at 7-8 (section 112); see *supra* notes 20-33 and accompanying text. Section 112(1) could cause non-enforcement of the employer sanctions if 8 U.S.C. § 1324 (1982) penalties are deemed too severe because the Justice Department may not want to prosecute employers when criminal penalties could be so quickly imposed.

¹⁶⁰ H.R. REP. NO. 115.1, *supra* note 87, at 1-17.

¹⁶¹ H.R. 1510, *supra* note 131.

¹⁶² *Id.*

¹⁶³ Interview, *supra* note 113.

¹⁶⁴ *Id.*

¹⁶⁵ *Id.*

¹⁶⁶ *Id.*

¹⁶⁷ *Id.*

¹⁶⁸ *Id.*

While the Simpson-Mazzoli legislation provides for positive reform on paper, serious defects become apparent when it is placed in a real world context.

IV. DEJURE AND DEFACTO EFFECTS OF THE PASSAGE OF FEDERAL SANCTIONS FOR EMPLOYING ILLEGAL ALIENS: OPENING UP PANDORA'S BOX

A. The Good Faith Defense

To fully understand the proposed legislation, it is necessary to consider the mechanics of an employer's compliance with the Act. This section discusses the procedures involved, the subjective and objective judgments an employer must make in evaluating a job applicant's credentials, and how compliance with the directives establishes a good faith defense and fits into notions of *scienter*. Applicant verification requirements supposedly "protect both persons subject to penalties and members of minority groups."¹⁶⁹

When an employer becomes subject to the applicant verification requirements, he must attest to the fact that he has examined the specified documentation of all job applicants being seriously considered for employment.¹⁷⁰ He must keep the attestation, which also contains the applicant's affirmation of his legal status, for the later of three years after the hiring or one year after termination of employment.¹⁷¹ Attestation records can only be used for enforcing employer sanctions, preventing fraudulent misuse of immigration documents or for prosecuting employment discrimination cases – not in connection with other Immigration and Naturalization Service activities.¹⁷² Finally, somewhat in line with the bill's provision that an applicant's documents need only reasonably appear on their face to be considered genuine, "it is not expected that employers ascertain the legitimacy of documents presented during the verification process."¹⁷³ Employers who choose to verify documents will be assisted by the Immigration and Naturalization Service.¹⁷⁴ Applicants whose genuine documents have been mistakenly rejected as being forgeries also will receive Immigration and Naturalization Service

¹⁶⁹ H.R. REP. NO. 115.1, *supra* note 87, at 44; *see infra* text accompanying notes 217-235 for an evaluation of the validity of the anti-discrimination rationale.

¹⁷⁰ *Id.* at 44-46.

¹⁷¹ *Id.* at 45.

¹⁷² *Id.* The fraudulent misuse of immigration documents is prohibited by 18 U.S.C. § 1546 (1982).

¹⁷³ *Id.* But *see infra* text accompanying notes 192, 224.

¹⁷⁴ H.R. REP. NO. 115.1, *supra* note 87, at 45.

assistance.¹⁷⁵

A number of sources have criticized the burdens imposed on employers who must comply with the above requirements. Business representatives have criticized shifting the enforcement of our immigration laws onto employers¹⁷⁶ and adding to the tax and other paperwork requirements with which employers must already comply.¹⁷⁷ More than one source has noted the irony of the "pro-deregulation" Reagan Administration's support for the Simpson-Mazzoli bill with its likely paperwork burden.¹⁷⁸ One group has performed its own Executive Order 12291/Office of Management and Budget cost effectiveness review of the Simpson-Mazzoli bill and has found the legislation seriously lacking.¹⁷⁹ For example, the group found that the legislation is not based on adequate information concerning the need for and consequences of employer sanctions, a test of whether the potential benefits outweigh the costs, and a full evaluation of alternatives, such as enforcing existing law.¹⁸⁰ According to the Office of Management and Budget, in addition to government and social expenses, time costs per each new hire aggregate to 7.5 million hours per year plus record keeping, reporting, inspection, and self-monitoring.¹⁸¹ Another group estimates the total costs to employers at \$100 million per year.¹⁸² Smaller employers may be particularly burdened because they lack the necessary administrative support staff.

The employer's good faith defense may not be as simple as it sounds. The Justice Department has stated that the *scienter* requirements "do not require that knowledge be established beyond a reasonable doubt. Once an employer has been served with a citation and continues to hire aliens without checking [their] documentation and in violation of the law, we believe that a case will be made out that the hiring was 'knowing.'"¹⁸³ By way of comparison, consider the liability of another business entity,

¹⁷⁵ *Id.*

¹⁷⁶ KNOWING EMPLOYMENT, *supra* note 3, at 95. (R. Thompson of the United States Chamber of Commerce).

¹⁷⁷ *Id.* at 130 (testimony of P. Ellsworth, Executive Vice-President, National Council of Agricultural Employers).

¹⁷⁸ *Id.* at 222-223 (testimony of D. North, Director, Center for Labor and Immigration Studies).

¹⁷⁹ No official cost benefit analysis has been performed. KNOWING EMPLOYMENT — COST BENEFIT, *supra* note 81.

¹⁸⁰ *Id.* at 243-253.

¹⁸¹ *Id.* at 246.

¹⁸² KNOWING EMPLOYMENT, *supra* note 3, at 151 (testimony of J. Huerta, Associate Counsel, Mexican American Legal Defense and Educational Fund).

¹⁸³ IMMIGRATION REFORM AND CONTROL ACT OF 1983: HEARINGS ON H.R. 1510 BEFORE COMM. ON JUDICIARY, 98th Cong., 1st Sess. 1451, (1983) [hereinafter cited as HOUSE 1983 HEARINGS]. Generally, the government has the burden of proving knowledge. IMMIGRATION REFORM AND CONTROL: REPORT OF THE SENATE COMMITTEE ON THE JUDICIARY, 98 Cong., 1st Sess. 9

transit lines, for assisting illegal aliens.¹⁸⁴ The transit companies must take an active part in assuring compliance with the United States laws and assume a legal duty to use reasonable diligence.¹⁸⁵ Finally, letters to an employer from the Immigration and Naturalization Service's new employee screening program, "Operation Cooperation," identifying employees as illegals could constitute notice for the purpose of meeting the "knowing" and "pattern and practice" requirements.¹⁸⁶ A successful Immigration and Naturalization Service raid might put an employer on notice.¹⁸⁷

B. Actual Enforcement

After enactment of the Simpson-Mazzoli bill, what should employers expect in terms of actual enforcement? While some estimate that seventy-five percent of employers would comply with sanctions,¹⁸⁸ a comparison of the present Immigration and Naturalization Service performance and existing employer sanction laws in Europe indicate employers have little to fear given the limited effectiveness of both.¹⁸⁹ Furthermore, limited federal funding and the rigorous *scienter* requirement may make the law more illusory than real. The *scienter* requirement, notwithstanding the Justice Department's protestations to the contrary,¹⁹⁰ probably makes prosecution unlikely.¹⁹¹ Any effort to increase the law's effectiveness would require the liability standard of a reasonable man or strict liability which would result in increased discrimination because employers would not risk violating the law.¹⁹²

(1981). But where just civil fines are involved, defendants cannot expect the same degree of due process. C. GORDON & H. ROSENFELD, *supra* note 14, at 9-6.

¹⁸⁴ See 8 U.S.C. §§ 1286-1287, 1323 (1982).

¹⁸⁵ C. GORDON & H. ROSENFELD, *supra* note 14, at 9-5 to -6, 9-20 to -22. (Reasonable diligence evaluated in terms of facts, degree of deception, conflicting statements).

¹⁸⁶ UNITED STATES COMMISSION ON CIVIL RIGHTS, THE TARNISHED GOLDEN DOOR: CIVIL RIGHTS ISSUES IN IMMIGRATION. 73 (1980) [hereinafter cited as U.S.C. RTS.] A "pattern or practice" in civil rights suits means that the act is part of the regular operating procedure. *Int'l Bd. of Teamsters v. United States*, 431 U.S. 324 (1977).

¹⁸⁷ Catz, *supra* note 6, at 774.

¹⁸⁸ See KNOWING EMPLOYMENT, *supra* note 3, at 4.

¹⁸⁹ See *infra* notes 193-97 and accompanying text. Employer sanctions in Europe have generally been ineffective. 129 CONG. REC. S6948-50, *supra* note 78, (citing Government Accounting Office report of 20 European countries). Many employers simply internalize the costs of penalties as a cost of production or evade the law. *Id.*

¹⁹⁰ See KNOWING EMPLOYMENT, *supra* note 3, at 4; *supra* note 183 and accompanying text.

¹⁹¹ Smith & Mendez, *supra* note 118, at 59. In addition, the enforcement of employer sanctions rests heavily on prosecutorial discretion and the government must overcome pro-corporate jury bias. See KNOWING EMPLOYMENT — ALT. PERSP., *supra* note 54, at 339-40.

¹⁹² See *infra* text accompanying notes 194-235; KNOWING EMPLOYMENT — ALT. PERSP., *supra* note 54, at 398-403.

Employer sanctions, if enacted, would become part of a larger body of Immigration and Naturalization Service administrative law and practice that provide insight to judicial review and the role of enforcement personnel at the Service.¹⁹³ The Immigration and Naturalization Service is not without its critics who credibly charge that it fails to keep its cases up to date and inadequately communicates its programs to the public.¹⁹⁴ Further, it has difficulties combining its service functions, that include administrative and adjudicatory duties, with its enforcement functions without the service function losing its effectiveness.¹⁹⁵ In addition, critics maintain that the system for investigating complaints of Immigration and Naturalization Service officer misconduct needs revamping¹⁹⁶ given evidence of officer incompetency and brutality.¹⁹⁷

The Immigration and Naturalization Service has already mapped out its approach to administering employer sanctions and views its objectives as encouraging voluntary compliance and targeting enforcement to maximize results.¹⁹⁸ The Immigration and Naturalization Service plans a program of public information,¹⁹⁹ officer training,²⁰⁰ targeting enforcement to certain employers,²⁰¹ and imposing a four-step citation process.²⁰² Targeting included "operations based on historical data compiled against habitual employers of illegal aliens and on profiles of industries that are known to attract illegal aliens,"²⁰³ and coordination

¹⁹³ See *infra* notes 217-235; see generally C. GORDON & H. ROSENFELD, *supra* note 14, at 1-37 to 1-100 (role of various Administration agencies in immigration); 8-52 to -70, 8-120 to -140 (review of agency); 8-178 (immigration officers have good faith defense from personal liability suits and there have never been any successful damage suits); 9-59 to -60 (arrests under Immigration and Nationality Act must be made by criminal law enforcement or designated immigration officer).

¹⁹⁴ U.S.C. Rts., *supra* note 186, at 23-44. See generally Peal, *Immigration Bill Hard to Enforce, Specialists Assert*, N.Y. Times, June 25, 1984, at 1, col. 2.

¹⁹⁵ U.S.C. Rts, *supra* note 186, at 23-44.

¹⁹⁶ *Id.* at 117-29.

¹⁹⁷ See Chicago Tribune, *supra* note 103; see generally J. CREWDSON, *THE TARNISHED DOOR* (1983). The Immigration and Naturalization Service's "non-management" finds expression in antiquated and incomplete records, a lack of computerization, inadequate staffing, top appointees who owe their positions to political connections and not merit, abuse of overtime pay, and corruption of service officials. *Id.* at 113-41. President Carter could not even get an estimate of the number of Iranians living in the United States when he needed it during the hostage crisis. *Id.* Officers of the Service are known to brutally beat aliens suspected of being illegals. *Id.* at 175. In one case, the Service deported a 14-year-old Hispanic American boy, who claimed officers had ignored his offer of proof of American citizenship. See also Chicago Tribune, *supra* note 103.

¹⁹⁸ HOUSE 1983 HEARINGS, *supra* note 183, at 249 (testimony of A. Nelson, Commissioner, Immigration and Naturalization Service).

¹⁹⁹ *Id.*

²⁰⁰ *Id.*

²⁰¹ *Id.*

²⁰² *Id.* at 249-50.

²⁰³ *Id.*

with the Labor Department and the Social Security Administration.²⁰⁴ The initial investigation will include a review of employee applications and eligibility-to-work forms attested to by the employers with an Immigration and Naturalization Service follow-up for questionable records.²⁰⁵ Under the Simpson-Mazzoli Act, an employer must make such forms available for Immigration and Naturalization Service or Labor Department inspection, and a subpoena is probably available if such compliance is not forthcoming.²⁰⁶ The four-step citation process includes (1) a warning notice that an undocumented alien is being employed having no provision for administrative review; (2) a \$1,000 per alien fine; (3) a subsequent \$2,000 per alien fine after the first fine is administratively final; and then (4) a \$3,000 fine per alien and criminal sanctions after civil fines are final.²⁰⁷ The Department of Justice has testified that it favors leaving to Immigration and Naturalization Service discretion how the targeting approach should be implemented²⁰⁸ and to the Attorney General's discretion the choice between injunctive remedies or criminal sanctions in the case of repeated violations.²⁰⁹ But the Justice Department has indicated that it favors fixed fines.²¹⁰

One probable consequence of sanctions may be that the Immigration and Naturalization Service will no longer receive an employer's permission to enter his business and search for undocumented aliens, but now may have to obtain a search warrant since employers will not want to subject themselves to sanctions.²¹¹ In this regard, it is noteworthy that evidence obtained in violation of a worker's Fourth Amendment rights may be admissible against an employer.²¹²

Another key to the intensity of sanction enforcement is its funding;

²⁰⁴ *Id.*

²⁰⁵ *See id.* at 249-50.

²⁰⁶ KNOWING EMPLOYMENT, *supra* note 3, at 25-26.

²⁰⁷ H.R. REP. NO. 115.1, *supra* note 87, at 42-43.

²⁰⁸ HOUSE 1983 HEARINGS, *supra* note 183, at 1454-55.

²⁰⁹ *Id.* at 1451.

²¹⁰ *Id.* at 1453.

²¹¹ KNOWING EMPLOYMENT — ALT. PERSP., *supra* note 54, at 420; *cf.* Immigration and Naturalization Service v. Delgado, 52 U.S.L.W. 4436 (U.S. Apr. 17, 1984). Immigration and Naturalization Service reliance on a generalized warrant or employer permission justifies a full factory survey where workers are questioned about their citizenship by agents dispensed throughout the workplace and stationed at exits. *Id.* Such a survey is not so intimidating as to become a seizure protected by the Fourth Amendment. *Id.* at 4438. Such a survey is a "classic consensual encounter." *Id.* at 4439. The dissent warned that, "the Court has become so mesmerized by the magnitude of the [illegal alien] problem that it has too easily allowed Fourth Amendment rights to be sacrificed." *Id.* at 4444.

²¹² *Rakas v. Illinois*, 439 U.S. 128, 133 (1978) (Fourth Amendment rights are personal), *reh'g denied*, 439 U.S. 1122 (1979); *cf.* Immigration and Naturalization Service v. Lopez-Mendoza, 52 U.S.L.W. 5190 (U.S. July 5, 1984) (exclusionary rule does not apply to civil deportation hearings).

many authorities have questioned its adequacy.²¹³ While not all the purported gains of sanctions have been calculated, the Office of Management and Budget estimates that the entire Immigration Reform and Control Act will cost \$4.5 billion over five years.²¹⁴ But some private estimates place the costs of employer sanctions at \$7 billion a year.²¹⁵

In light of the above, it seems that an employer who keeps no records and has no "foreign looking" workers will simply not be singled out for the limited enforcement efforts the Immigration and Naturalization Service is capable of performing.²¹⁶

C. Discriminatory Effects of Sanctions

One of the most serious flaws of employer sanctions is that they will result in massive discrimination not only against documented aliens, but also against United States citizens of Hispanic origin and other minorities. Employer sanctions serve to place the government between a job applicant and the employer since the decision to hire must now include factors beyond the applicant's suitability for the job as determined by the employer alone. This result seems incongruent in a society based on free market concepts.²¹⁷ The government now intervenes to prevent racial discrimination in hiring through Title VII of the Civil Rights Act of 1964,²¹⁸ thus also limiting an employer's autonomy in the hiring decision. Title VII promotes a rational market allocation based on rational standards of merit – not characteristics of birth,²¹⁹ but only protects American citizens.²²⁰ With the advent of employer sanctions, the government actively promotes discrimination against applicants based in large part on their ethnic heritage.²²¹

Several sources have recognized that an unfortunate side-effect of employer sanctions will be job discrimination.²²² Subjective discrimination will result in three ways. First, employers, facing possible civil and criminal liability, will naturally be more cautious and suspicious in considering the employment application of certain individuals. Employers will target "foreign looking or sounding" individuals, Hispanics for ex-

²¹³ H.R. REP. NO. 115.1, *supra* note 87, at 48-50 (current appropriation proposals).

²¹⁴ 129 CONG. REC. S6956-58, *supra* note 78.

²¹⁵ KNOWING EMPLOYMENT, *supra* note 3, at 171.

²¹⁶ *See id.* at 231-233.

²¹⁷ *See* Smith & Mendez, *supra* note 118, at 49-50.

²¹⁸ 42 U.S.C. § 2000(e) (1982).

²¹⁹ *Id.*

²²⁰ *See infra* text accompanying notes 271-84.

²²¹ *See* KNOWING EMPLOYMENT, *supra* note 3, at 227.

²²² *Id.* at 58 (testimony of L. Fuchs), 145 (testimony of the Mexican American Legal Defense and Education Fund), 104 (testimony of the Chamber of Commerce).

ample, as well as other ethnic groups who have long been associated with illegal immigration. The Simpson-Mazzoli bill only provides an affirmative defense when documentation *reasonably* appears on its face to be genuine.²²³ This provision seems to require that the employer judge the document's authenticity in order to be sure that it belongs to the individual presenting it.²²⁴ The employer's scrutiny will increase for the targeted groups. At the second level of subjective discrimination, employers will just "play it safe" and avoid hiring any "foreign looking" applicants to avoid liability and frequent inspections from the Immigration and Naturalization Service.²²⁵ Businesses with the least administrative resources are most likely to choose this "safe" path.²²⁶ Lastly, subjective, active discrimination will result as employers use the sanctions as an excuse to continue to discriminate or act independently to carry out their "civic duty."²²⁷

Advocates of sanctions insist that an effective brake on illegal immigration will diminish xenophobia and exploitation of low-skilled workers.²²⁸ Hispanics, for example, may no longer be blamed for "taking" jobs.²²⁹ Further, advocates point out that employers must check the identification of all applicants being seriously considered,²³⁰ not just Hispanics. Finally, they advance fraud-proof identification as the ultimate solution to resulting discrimination because the identification would supposedly eliminate the employers' subjective determinations over a document's validity.²³¹

But employers can discriminate against minority job applicants by refusing to acknowledge that the identification picture matches its holder even when they do match.²³² In addition, government employees can refuse, for discriminatory reasons, to issue the national identification card to certain applicants.²³³ Whether existing identification or a national identification card is used, "it is apparent that low-income, mar-

²²³ H.R. REP. NO. 115.1, *supra* note 87, at 74 (new section 274(A)(b)).

²²⁴ Pandya, Parker, & Glitzenstein, *Discriminatory Effects of Employer Sanctions Programs Under Consideration By the Select Commission on Immigration and Refugee Policy* (1980) (paper by Georgetown University Institute for Public Representation) [hereinafter cited as KNOWING EMPLOYMENT — DISCR.], *reprinted in* KNOWING EMPLOYMENT, *supra* note 3, at 260.

²²⁵ KNOWING EMPLOYMENT — COST BENEFITS, *supra* note 81, at 248.

²²⁶ U.S.C. RTS., *supra* note 186, at 62-63.

²²⁷ KNOWING EMPLOYMENT — DISCR., *supra* note 224, at 256.

²²⁸ KNOWING EMPLOYMENT, *supra* note 3, at 138.

²²⁹ *See id.*

²³⁰ KNOWING EMPLOYMENT, *supra* note 3, at 51 (testimony of Sen. Simpson, Wyoming).

²³¹ *See* KNOWING EMPLOYMENT, *supra* note 3, at 58 (testimony of L. Fuchs); *see also infra* text accompanying notes 291-316.

²³² *Id.*

²³³ *Id.*

ginally employed persons. . . will often not have generated the records required for work authorization.”²³⁴ These people will become the new, exploitable “illegals.”

In sum, employer sanctions will create an environment for discrimination much as they have in Europe where frequent identity checks of blacks by police have resulted in resentment and some disturbances.²³⁵

Serious doubts exist as to whether statutory or constitutional safeguards can prevent the range of discriminatory side effects of employer sanctions. New complaints of discrimination arising from sanctions will increase the already heavy work load of the Equal Employment Opportunity Commission.

D. Legal Consequences of Employment Discrimination in the Context of Employer Sanctions

1. *Introduction and the Fourteenth Amendment*

This section explores the constitutionality of employer sanctions and the liability facing employers complying with them, under both strict scrutiny and rational relation tests. It will examine the rights of citizens, legal aliens and undocumented aliens to equal treatment under the Constitution’s Thirteenth and Fourteenth Amendments and Title VII of the Civil Rights Act of 1964, and explore whether employer sanctions may violate those rights. The section distinguishes between an incident arising from an intent to discriminate and one which simply results in an impact disproportionately burdensome to a certain ethnic group.

Any due process or equal rights protection inquiry into employer sanctions must first acknowledge that the Supreme Court has long “characterized the power to exclude aliens as political in nature and completely immune from judicial scrutiny.”²³⁶ Yet “in recent years the courts have been increasingly reluctant to endorse the theory of absolute legislative power to direct expulsions”²³⁷ and, of course, employer sanctions involve much more than just expulsions. Further, in terms of standing, “when a government prohibition or restriction imposed on one party causes specific harm to [a] third party, harm that a constitutional provision or statute was intended to prevent, the indirectness of the injury does not necessarily deprive the person harmed of standing to vindicate

²³⁴ KNOWING EMPLOYMENT — DISCR., *supra* note 224, at 267.

²³⁵ KNOWING EMPLOYMENT, *supra* note 3, at 206 (testimony of J. Miller). *But see id.* at 216.

²³⁶ *See* C. GORDON & H. ROSENFELD, *supra* note 14, at 1-34; *Harisiades v. Shaughnessy*, 342 U.S. 580, 588-89 (1952).

²³⁷ C. GORDON & H. ROSENFELD, *supra* note 14, at 1-35.

cate his rights."²³⁸ In other words, parties discriminated against because of the enactment of employer sanctions should have standing to challenge the legislation.

Before considering potential violations of due process and equal protection, it is important to distinguish between undocumented aliens, legal aliens, and Hispanic American citizens. As a major treatise has stated, in many respects an alien in the United States has equality of status with America citizens. But in other respects his status is still inferior. These disparities are perhaps in part a survival of ancient hostility to the stranger and in part the reflection of incomplete identification with the nation and community.²³⁹

While the protections afforded by the Constitution's Fifth and Fourteenth Amendments generally apply to documented and undocumented aliens, there are some limits relative to rights in ownership, residency and employment.²⁴⁰ But in contrast to an illegal alien, "a resident alien's right to earn a livelihood is assured by the Fifth and Fourteenth Amendments and treaty provisions with various nations."²⁴¹ The federal employer sanctions would provide the necessary state action to invoke the Fourteenth Amendment to protect an individual's basic right to pursue employment.²⁴² A state may enact hiring restrictions on legal aliens, however, where jobs involve the formulation or discretionary execution of state policy.²⁴³ This exception includes, for example, employment in police departments and public schools.²⁴⁴ Finally, the right to receive state government benefits is basically established for legal aliens and to some degree recognized for undocumented aliens.²⁴⁵ At least one deci-

²³⁸ *Warth v. Seldin*, 422 U.S. 490, 505 (1975) (such indirectness can, however, make it more difficult to achieve standing).

²³⁹ C. GORDON & H. ROSENFELD, *supra* note 14, at 1-162; *Yick Wo v. Hopkins*, 118 U.S. 220, 226 (1886) (holding that the Fourteenth Amendment is not confined to citizens).

²⁴⁰ C. GORDON & H. ROSENFELD, *supra* note 14, at 1-163 to -164; *Hellenic Lines Ltd. v. Rhoditis*, 398 U.S. 306, *reh'g denied*, 400 U.S. 856 (1970) (certain constitutional rights apply to undocumented aliens including protections of the First, Fifth and Fourteenth Amendments).

²⁴¹ C. GORDON & H. ROSENFELD, *supra* note 14, at 1-168; *Truax v. Raich*, 239 U.S. 33 (1915) (state may not preempt congressional control over immigration by prohibiting employers of more than five persons from employing more than 20% aliens).

²⁴² *Hampton v. Mow Sun Wong*, 426 U.S. 88, 116 (1976) (Civil Service Commission cannot ban alien employment in federal government). By Executive Order No. 11,935, now aliens are banned from much federal employment in the interests of national security and reducing domestic unemployment. *Smith & Mendez*, *supra* note 118, at 44-58; *Vergara v. Hampton*, 581 F.2d 1281, 1284 (7th Cir. 1978) (upholds the validity of the executive order), *cert. denied*, 441 U.S. 905 (1979).

²⁴³ C. GORDON & H. ROSENFELD, *supra* note 14, at 1-172 to -174; *see Comment*, *supra* note 116, at 695 n.81.

²⁴⁴ *See Comment*, *supra* note 116, at 695 n.81.

²⁴⁵ HOUSE 1983 HEARINGS, *supra* note 183, at 1403-1406 (testimony of the American Civil Liberties Union).

sion has held that undocumented aliens are persons within the meaning of the Fourteenth Amendment.²⁴⁶ Legal and illegal aliens' right to federal funds, however, is much more limited.²⁴⁷

Thus, it appears that the result of an equal protection attack on employer sanctions is uncertain. Whether all classifications based on noncitizenship constitute a suspect class and therefore deserve strict scrutiny is open to question. All such classifications do seem aimed at the requisite particular minorities with a history of discrimination and with little political power.²⁴⁸ But noncitizenship is not an immutable characteristic.²⁴⁹ On balance, except where national security or a delegation of state power is involved,²⁵⁰ legal aliens would seem to be fully covered under the Fourteenth Amendment. But the case of sanctions against illegal immigrants seems to be part of Congress' immigration powers²⁵¹ or, alternatively, involves one of the rare compelling interests necessary to uphold a suspect classification. At present, the only case upholding explicit racial discrimination is *Korematsu v. United States*,²⁵² where Japanese Americans were forced away from their West Coast homes for "compelling" national security reasons during World War II. It would seem that illegals do not threaten national security as much as they may negatively affect employment opportunities for Americans.

Although it may constitutionally discriminate against illegal aliens, Congress probably cannot discriminate against legal aliens and certainly cannot discriminate against Hispanic Americans. Yet, as discussed previously, employer sanctions will probably result in discrimination against legal aliens and Hispanic Americans.²⁵³ Legislative classifications that are intrinsically open to discriminatory use, even those that are facially neutral, violate the Fourteenth Amendment unless they meet a very high standard.²⁵⁴ That standard invokes a heavy burden of justification in which the legislation is upheld only "if it is necessary, not merely rationally related, to a permissible state policy."²⁵⁵ But unlike *Yick Wo v.*

²⁴⁶ *Plyler v. Doe*, 457 U.S. 202 (1982), *reh'g denied*, 458 U.S. 1131 (1982) (public school education is a protected right).

²⁴⁷ HOUSE 1983 HEARINGS, *supra* note 183, at 1403-1406.

²⁴⁸ L. TRIBE, AMERICAN CONSTITUTIONAL LAW 1052-56 (1978).

²⁴⁹ *Id.*

²⁵⁰ See Comment, *supra* note 116, at 695 n.81.

²⁵¹ See C. GORDON & H. ROSENFELD, *supra* note 14, at 1-34; *Harisiades*, 342 U.S. 580.

²⁵² 323 U.S. 214 (1944).

²⁵³ See *supra* text accompanying notes 217-35.

²⁵⁴ *Yick Wo*, 118 U.S. at 356; see generally KNOWING EMPLOYMENT — DISCR., *supra* note 224, at 306-07.

²⁵⁵ *McLaughlin v. Florida*, 379 U.S. 184, 196 (1964), (state statute, prohibiting unmarried black/white couple from living together, held invalid). Unlike *McLaughlin*, employer sanctions contain no

*Hopkins*²⁵⁶ where the government action was clearly aimed at closing down the laundries of *all* aliens, here only undocumented aliens can be legally discriminated against. The inquiry must thus look to the discriminatory impact on the clearly protected legal aliens and Hispanic Americans. Recently, however, the Supreme Court has generally required more than discriminatory impact. The Court has required a showing of intent to discriminate to constitute a Constitutional violation.²⁵⁷

2. *Due Process*

In terms of due process, four separate challenges can be made against employer sanctions.²⁵⁸ First, due process may be violated because "questionable" job applications are denied consideration without a hearing.²⁵⁹ Second, employer sanctions may be in fact unrelated to the government's objectives of controlling the borders and protecting American jobs.²⁶⁰ There is evidence presented in this Comment that no such relationship may exist.²⁶¹ Third, sanction classification may be in fact both over and under-inclusive.²⁶² For example, American citizens without documentation may be considered illegal²⁶³ and some illegals will obtain fraudulent identification and receive jobs. Finally, employer sanctions may involve a vague delegation of legislative power to the Executive and to private employers who actually screen applicants, thus rendering foreign-looking and sounding individuals vulnerable to arbitrary and capricious determinations.²⁶⁴

3. *Statutory Protections*

A private employer who discriminates against an Hispanic American or a documented alien may be liable under both Title VII of the Civil

explicit racial classifications, but the classification by citizenship serves the same purpose because in the labor context it is so closely linked with Hispanics.

²⁵⁶ 118 U.S. at 356.

²⁵⁷ *TRIBE*, *supra* note 248, at 1028-32; *Washington v. Davis*, 426 U.S. 229 (1976) (black police candidates who suffer a disproportionately greater test failure cannot seek a strict scrutiny analysis of their case by the Court because no intent to discriminate was alleged).

²⁵⁸ See generally *KNOWING EMPLOYMENT — DISCR.*, *supra* note 224, at 303-06.

²⁵⁹ Cf. *Vitek v. Jones*, 445 U.S. 480 (1980) (the Constitution requires due process safeguards before a state prisoner is transferred to a mental institution); see *KNOWING EMPLOYMENT — DISCR.*, *supra* note 224, at 304.

²⁶⁰ See *supra* text accompanying notes 84-97.

²⁶¹ See *infra* text accompanying notes 333-36.

²⁶² Cf. *Cleveland Board of Educ. v. LaFleur*, 414 U.S. 632 (1974) (Powell, J. concurring) (the Fourteenth Amendment prohibits overbroad classifications when they infringe on basic constitutional liberties and where more exact measures are available).

²⁶³ See *KNOWING EMPLOYMENT — DISCR.*, *supra* note 224, at 304-05.

²⁶⁴ See *id.*

Rights Act of 1964²⁶⁵ and 42 U.S.C. § 1981.²⁶⁶ If an Hispanic American citizen can prove that another identifiable class of job applicants received more favorable treatment from the defendant employer because of a class distinction and not because of the employer's honest attempt to comply with the law, the Hispanic American can receive equitable and legal relief, such as reinstatement and damages, under 42 U.S.C. § 1981.²⁶⁷ The courts are split, however, concerning the right of an alien, even a documented one, to claim similar protection under 42 U.S.C. § 1981.²⁶⁸ At least one commentator predicts that the Supreme Court would exclude aliens from § 1981's coverage because such a holding would be consistent with application of Title VII of the Civil Rights Act of 1964 to aliens.²⁶⁹

Generally, all aliens may bring suit in a United States court.²⁷⁰ In *Espinoza v. Farah Mfg.*,²⁷¹ however, the Court held that the protection under Title VII of the Civil Rights of 1964 against discrimination based on national origin does not include discrimination based on noncitizenship.²⁷² Nevertheless, the Court suggested that an employer could not discriminate solely against the aliens of a certain country.²⁷³ Thus an employer may discriminate against any Hispanic in the course of hiring as long as he does so because of the applicant's apparent lack of citizenship generally, not his Mexican citizenship specifically. This decision is inconsistent with established precedent in the area of Title VII and undercuts the spirit of the legislation. "The language of Title VII makes plain the purpose of Congress to assure equality of employment opportu-

²⁶⁵ 42 U.S.C. § 2000(e) (1982).

²⁶⁶ 42 U.S.C. § 1981 (1982) comes from the enabling provisions of the Thirteenth Amendment which guaranteed all the rights that whites enjoy.

²⁶⁷ See *LaFore v. Emblem Tape & Label Co.*, 448 F. Supp. 824 (D.C. Col. 1978) (Mexican-American plaintiff alleged employment terminated only because of his color/race/national origin).

²⁶⁸ *Guerra v. Manchester Terminal Corp.*, 498 F.2d 641, 653-55 (5th Cir. 1974) (Private and public employment practice by employer and union that discriminate on the basis of citizenship violates 42 U.S.C. § 1981 (1982), which guarantees all persons in the United States the same privileges, rights, and immunities enjoyed by white citizens), *reh'g denied*, 503 F.2d 567 (5th Cir. 1974). But see *DeMalherbe v. Int'l Union of Elevator Constructors*, 438 F. Supp. 1121, 1136-42 (N.D. Cal. 1977) (§ 1981 only covers discrimination against aliens by a public entity).

²⁶⁹ *Smith & Mendez*, *supra* note 118, at 26.

²⁷⁰ *C. GORDON & H. ROSENFELD*, *supra* note 14, at 1-182; *Artega v. Allen*, 99 F.2d 509, 510 (5th Cir. 1938) (there is no need for an alien to even show he is legally in the United States in order to bring suit. [D]ismissed on other grounds).

²⁷¹ *Espinoza v. Farah Mfg. Co.*, 414 U.S. 86 (1973) (legal alien refused employment solely because of her citizenship; most of defendants' plant staffed with Hispanic American citizens).

²⁷² *Id.* The dissent agreed with the Equal Employment Opportunity Commission "that discrimination on the basis of alienage *always* has the effect of discrimination on the basis of national origin." *Id.* at 99 (Douglas, J. dissenting).

²⁷³ *Id.* at 96.

nity and to eliminate those discriminatory practices and devices which have fostered racially stratified job environments to the disadvantage of minority citizens."²⁷⁴ Further, "subjectivity in hiring decisions is a ready vehicle for discrimination whether intentional or not, that has been condemned by the courts."²⁷⁵ Finally, in contrast to a claim under the Fourteenth Amendment, which requires a showing of intent, Title VII prohibits employment qualifications that disproportionately and negatively affect minorities where the qualifications have nothing to do with the ability needed to do the job.²⁷⁶ Here the disproportionate impact falls on legal aliens and Hispanic Americans taken to be illegal aliens by employers.

Ordinarily, an Hispanic American citizen would make out a prima facie Title VII case if he applied for a job, was qualified, was rejected, and the position remained open.²⁷⁷ Assuming that the employer did not admit that the rejection was based on the applicant's foreign appearance, the employer could rebut any discrimination charge with a legitimate rationale.²⁷⁸ Since an employer can choose to further business goals over the commitment to consider all applicants,²⁷⁹ and since he can rebut the claim with only a legitimate rationale rather than the more rigorous requirement to prove the absence of a discriminatory motive,²⁸⁰ the affected Hispanic who has truly suffered employment discrimination has little hope. The effort to comply with the employer sanction law seems to provide the perfect, "legitimate" rationale.

The Justice Department and others, however, reject the above reasoning in part because employers cannot selectively enforce its requirements.²⁸¹ In the end, whether or not an employer reasonably suspected that an applicant was an illegal alien is a question for the trier of fact

²⁷⁴ *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 800 (1973), *motion to relax costs denied*, 414 U.S. 811 (1975); see *KNOWING EMPLOYMENT — DISCR.*, *supra* note 224, at 299-300.

²⁷⁵ *KNOWING EMPLOYMENT — DISCR.*, *supra* note 224, at 299; see, e.g., *Rowe v. GMC*, 457 F.2d 348, 359 (5th Cir. 1972) (Title VII litigation).

²⁷⁶ *Griggs v. Duke Power Co.*, 401 U.S. 424 (1971); cf. *Garcia v. Gloor*, 618 F.2d 264 (5th Cir. 1980) (court upholds company rule that bilingual workers speak only English while at work in public areas), *cert. denied*, 449 U.S. 1113 (1981); see *KNOWING EMPLOYMENT — DISCR.*, *supra* note 224, at 300.

²⁷⁷ *McDonnell*, 411 U.S. at 802 (court found the employer rebutted the prima facie case with a showing that the plaintiff had committed illegal acts against the employer); see *KNOWING EMPLOYMENT — DISCR.*, *supra* note 224, at 301.

²⁷⁸ See *infra* note 280.

²⁷⁹ *Furnco Construction Co. v. Waters*, 438 U.S. 567, 577-78 (1978); see *KNOWING EMPLOYMENT — DISCR.*, *supra* note 224, at 302.

²⁸⁰ *Bd. of Trustees v. Sweeney*, 439 U.S. 24 (1978); see *KNOWING EMPLOYMENT — DISCR.*, *supra* note 224, at 303.

²⁸¹ *HOUSE 1983 HEARINGS*, *supra* note 183, at 1463-64.

based on the request of documentation, its apparent authenticity, sequence of events, and treatment of other applicants.²⁸²

Even assuming that an employer cannot always hide his discrimination behind the sanctions law, Title VII exempts employers of 14 or fewer workers or employers with workers employed less than 20 weeks per year.²⁸³ Finally, in certain specialized circumstances, "national origin is a bona fide occupational qualification reasonably necessary to the normal operation of a business."²⁸⁴

4. *Simpson-Mazzoli Antidiscrimination Measures*

Variations on the Simpson-Mazzoli bill contain several measures designed to combat discrimination arising from the imposition of employer sanctions. First, one version provides funding for semi-annual reports by the President concerning the sanctions' impact on employment, including discrimination against Hispanic Americans.²⁸⁵ Second, the United States Civil Rights Commission is charged with monitoring the sanctions' impact, investigating reports of discrimination, and reporting any patterns of discrimination that may result.²⁸⁶ Lastly, an interdepartmental task force is established with funding to monitor any resulting discrimination.²⁸⁷ But it is unlikely that these provisions alone, not tied to any mandatory Congressional or enforcement action, can blunt discrimination. Reporting a rise in discrimination does not deter that discrimination; penalties are the only deterrent. The House bill provides a Special Counsel to seek injunctive relief and civil fines for employment discrimination against United States citizens and legal aliens based on national origin or alienage.²⁸⁸ This protection applies to employers of four or more workers who are not covered by existing civil rights law.²⁸⁹ But the real answer to discriminatory impacts is said to be a national fraud-proof identification.²⁹⁰

E. Employee Identification System

Business leaders, Congressmen, and the Select Commission on Immigration and Refugee Policy all have called for some form of national,

²⁸² Cf. S. REP. NO. 98-62, 98th Cong., 1st Sess., at 11-12.

²⁸³ 42 U.S.C. § 2000(e)(b) (1982).

²⁸⁴ 42 U.S.C.S. § 2000(e)(2)(e) (1982).

²⁸⁵ H.R. REP. NO. 115.1, *supra* note 87, at 47.

²⁸⁶ *Id.*

²⁸⁷ *Id.*

²⁸⁸ H.R. 1510, *supra* note 131.

²⁸⁹ *Id.*

²⁹⁰ *E.g.*, KNOWING EMPLOYMENT, *supra* note 3, at 50-51 (testimony of Sen. Grassley, Iowa).

fool-proof identification to implement employer sanctions.²⁹¹ The Senate has delayed any firm commitment to institute such a system because of the costs and "big brother" concerns associated with it.²⁹² Critics charge that without a national fraud-proof identification system, sanctions will not limit illegal alien employment but will increase discrimination against undocumented aliens and Hispanic Americans.²⁹³ Using existing documentation will result in increased fraudulent documentation²⁹⁴ and will place the burden on employers to determine authenticity, with many employers "playing it safe" and others intentionally discriminating.²⁹⁵ On the other hand, the government will face an effective good faith affirmative defense from those who check the identification²⁹⁶ of workers who later turn out to be illegal aliens with forged documents.

The Select Commission has outlined three alternatives for implementing a national identification system: the telephone call-in data bank system recently adopted by the House, a new single-use employee eligibility card with a data bank tie-in, and an improved social security card with counterfeit-proof features and data bank tie-in.²⁹⁷ The Commission has estimated that a system would take five to seven years to phase into America's 100-million-person workforce.²⁹⁸

The annual cost of implementing a national identification and verification system is estimated at \$1.5 to \$3.5 million²⁹⁹ or more. In the past, the implementation of other identification systems, such as "foolproof alien registration cards," have been delayed and exceeded their cost estimates by 500%.³⁰⁰ In addition, they have created a large bureaucracy and considerable confusion among employers.³⁰¹ Moreover, because existing documentation would be required to obtain a national identification card, fraud could still come into play.³⁰² Of course, there is also the possibility of "look alikes" exchanging identification. Finally, any sys-

²⁹¹ See, e.g., *Id.*

²⁹² See, e.g., 129 CONG. REC., *supra* note 78, at S6927-28 (quoting William Safire).

²⁹³ KNOWING EMPLOYMENT, *supra* note 3, at 55-63 (testimony of L. Fuchs).

²⁹⁴ *Id.* at 38 (testimony of Treasury Department).

²⁹⁵ *Id.* at 58 (testimony of L. Fuchs); see *supra* text accompanying notes 217-35.

²⁹⁶ See *supra* text accompanying notes 169-87.

²⁹⁷ *Id.* at 56; see Smith & Mendez, *supra* note 118.

²⁹⁸ KNOWING EMPLOYMENT, *supra* note 3, at 57 (testimony of L. Fuchs).

²⁹⁹ *Id.* at 105-08 (testimony of the Chamber of Commerce).

³⁰⁰ *Id.*

³⁰¹ *Id.*

³⁰² FINAL REPORT OF THE SELECT COMMISSION ON IMMIGRATION AND REFUGEE POLICY: JOINT HEARINGS BEFORE THE SUBCOMM. ON IMMIGRATION AND REFUGEE POLICY OF THE SENATE AND HOUSE COMM. ON THE JUDICIARY, 97th Cong., 1st Sess., 153 (1981) [hereinafter cited as FINAL REPORT HEARINGS].

tem of documentation must account for bribes to or carelessness of identification inspectors.

Discrimination could occur when a government agent, instead of a private employer, makes a determination concerning the authenticity of documents submitted to receive a national identification card. Those "foreign looking" applicants may very well have their documents more rigorously inspected and not receive the benefit of the doubt.³⁰³

In addition to questions about the effectiveness of a national identification system, there are two major arguments lodged against it. First, just as the social security card was introduced with a disclaimer about its use as an identification and information source, a national identification card, notwithstanding disclaimers, could facilitate a personal information system to be tapped by a variety of private and public sources.³⁰⁴ Currently, the Social Security Administration law enforcement offices, the Internal Revenue Service, the Census Bureau, and public assistance agencies have their information tapped by a variety of outside sources in a manner not originally contemplated.³⁰⁵ A national identification card for employment would complete a *de facto* national personal dossier system³⁰⁶ and possibly infringe on privacy rights.

Second, a national identification card for employment could very well become an internal passport for many. If provisions in the bill to the contrary can be overcome, the identification card could serve as a tool to immigration officers who are searching for illegal aliens. Currently, an officer can stop an automobile and detain the driver to check his license and his registration where the officer has a reasonable and articulable suspicion that the driver is subject to arrest or where the license check is conducted on all motorists passing a given checkpoint.³⁰⁷ If it became required, either *de jure* or *de facto*, to prove one's legal status by carrying the national identification card, society's interest in providing Americans with jobs and a uniform inspection of all could justify searches of workers unable to produce the card. The card also might have to be produced in conjunction with an officer's right to stop and question the passengers of a car reasonably suspected of carrying illegal aliens,³⁰⁸ especially

³⁰³ See KNOWING EMPLOYMENT — DISCR., *supra* note 224, at 268.

³⁰⁴ See U.S.C. RTS., *supra* note 186, at 66.

³⁰⁵ See HOUSE 1983 HEARINGS, *supra* note 183, at 1434-35 (American Civil Liberties Union). For example, the Parent Locator Service allows child support enforcement personnel to search "confidential" government and private records to trace delinquent parents. *Id.* at 1434.

³⁰⁶ See *Id.* at 1436.

³⁰⁷ *Delaware v. Prouse*, 440 U.S. 648, 663 (1979).

³⁰⁸ See *United States v. Brignoni-Ponce*, 422 U.S. 873 (1975); *cf.* *United States v. Ortiz*, 422 U.S. 891 (1975).

around border areas. The reasonableness of the suspicion would be based on the area, behavior, and physical appearance of the occupants.³⁰⁹ The validity of any subsequent seizure made after a stop to check identification would be based on a "weighing of the gravity of the public concerns served by the seizure, the degree to which the seizure advances the public interest, and the severity of the interference with individual liberty."³¹⁰

Proponents of a national identification card for employment respond to criticism by promising to insert four legal safeguards into any national identification system. First, individual information will only be available for employment eligibility verification.³¹¹ Second, verification will only be withheld if the applicant is an undocumented alien.³¹² Third, verification will only be used to enforce employee eligibility requirements and prevent falsification of immigration-related documents.³¹³ Lastly, "no identification document or card. . . can be required to be presented except for purposes of the [employee verification system] nor can it be required to be carried on one's person."³¹⁴ The information required would be of a limited nature, and strong historical and Constitutional forces would prevent any abuse of the national employment identification system aimed at undermining privacy rights.³¹⁵ But, as outlined above, other national information and identification systems have found use beyond their originally intended purposes.³¹⁶ The safeguards have a false ring because they fly in the face of every citizen's common experience with the unauthorized use of his social security card to facilitate the building of a personal dossier. The urge to use and abuse the information will simply be too great and few will be able to resist law officers' unauthorized but intimidating request to show the national identification card.

F. Impact of Sanctions on Labor Law

Enactment of employer sanctions will arguably have a severe effect on the ability to enforce various labor laws, including the right to form a union.³¹⁷ Illegal aliens are presently considered "employees" for pur-

³⁰⁹ See *Brignoni-Ponce*, 422 U.S. at 884-87.

³¹⁰ *Brown v. Texas*, 443 U.S. 47, 51 (1979).

³¹¹ H.R. REP. NO. 115.1 *supra* note 87, at 46.

³¹² *Id.*

³¹³ *Id.*

³¹⁴ *Id.*

³¹⁵ KNOWING EMPLOYMENT, *supra* note 3, at 58-59 (Fuchs).

³¹⁶ See *supra* notes 304-05 and accompanying text.

³¹⁷ Labor Management Relations Act of 1941, 29 U.S.C. §§ 141-187 (1982).

poses of the Labor Act and permitted to enjoy, to a large degree, the protections afforded thereunder.³¹⁸ But the courts have premised their coverage of illegal aliens under the Labor Act on the fact that an employer's moral obligation to report illegal aliens to the Immigration and Naturalization Service is not the same as a legal obligation and such a moral obligation does not prevent Labor Act protections from extending to illegal workers.³¹⁹ Courts are most likely to ignore the illegal status of workers when an employer's surge of civic duty or ultra-moral conduct comes after a successful union election. A court has stated that "because an employer does not violate the immigration laws by employing an illegal alien, these discriminatees [illegal aliens] could not subject [the employer] to any legal liability by applying for, or receiving, reinstatement."³²⁰

But employer sanctions would change the underlying premise of *Sure-Tan* and provide an opportunity for an employer to establish an impermissible conflict between including undocumented aliens under the National Labor Relations Act and the mandate of the Immigration and Nationality Act.³²¹ Sanctions may even end the complaints of exploited illegal aliens who may fear that the National Labor Relations Board cannot award them any tangible remedy, even a cease and desist order and conditional reinstatement. Such remedies would arguably conflict with federal law, but the issue is less than clear.³²² For example, reinstatement that is conditioned on the illegal alien's returning to the United States legally may not conflict with the sanction law.

From the union perspective, if the National Labor Relations Board cannot protect illegal aliens from unfair labor practices, the unions are effectively shut out of all workplaces employing illegal aliens.³²³

G. Economic Effect of Sanctions

This Comment's analysis would be incomplete without an examina-

³¹⁸ See *supra* text accompanying notes 56-77.

³¹⁹ *Sure-Tan, Inc. v. National Labor Relations Board*, 672 F.2d 592, 601 (7th Cir. 1982), *aff'd*, 104 S. Ct. 2803, 2809-10 (1984).

³²⁰ *Id.* at 605.

³²¹ See 236 N.L.R.B. 1627, 99 L.L.R.M. 1138 (1978), *enforced sub. nom.* N.L.R.B. v. Apollo Tire Co., 604 F.2d 1180 (9th Cir. 1979) (the National Labor Relations Board should not go into immigration matters, but the Board must consider modifying its reinstatement order if it subjects the company hiring illegal aliens to a valid state employer sanctions statute).

³²² See *Southern S.S. Co. v. N.L.R.B.*, 316 U.S. 31, 47 (1942) (the National Labor Relations Board must accommodate other Congressional purposes including prohibitions against mutiny by seamen).

³²³ Of course, if unions can limit the use of illegal workers by turning employers in under a sanction law, they might increase their strength to a degree.

tion of the debate concerning illegal aliens' place in the economy. Depending on the assumptions one holds, employer sanctions will either increase the job opportunities for legal workers or will increase prices and decrease job opportunities for all.³²⁴ In the end, neither view is completely right or completely wrong. Evidence indicates that substantial numbers of undocumented workers perform in both above and below minimum wage jobs.³²⁵ While illegal aliens may fill a need for unskilled labor in the United States,³²⁶ there is no question that they lower working conditions for some unskilled legal workers by lowering wages and increasing productivity demands.³²⁷

Proponents of sanctions maintain that decreasing the number of illegal aliens will result in a decrease in jobs taken away from legal workers and will better working conditions for United States' citizens.³²⁸ This conclusion rests on the assertion that illegal aliens do not often work under exploitative conditions, i.e., under conditions that are unacceptable to legal workers because of an unsafe work environment or pay below the minimum wage.³²⁹ At the very least it assumes that once illegal aliens, exploited because of the threat of deportation, leave, their jobs will remain and employers will have to provide better working conditions and better pay.³³⁰ Finally, it also assumes that United States citizens are ready to take on low-skilled, minimum wage jobs.³³¹ These assumptions appear to be well founded up to a point. Even if only half of the jobs held by illegal aliens now were to go to legal workers, the unemployment rate would decrease drastically.³³² On the other hand, if United States citizens are prepared to accept these jobs, why employ a workforce which is always susceptible to deportation? To assume all employers will upgrade

³²⁴ See U.S.C. RTS., *supra* note 186, at 58 n.4 ("replacement" and "segmentation" analysis respectively).

³²⁵ Cf. *infra* note 333.

³²⁶ See *supra* note 324 and accompanying text.

³²⁷ Wachter, *The Labor Market and Illegal Immigration: The Outlook for the 1980's*, 33 Indus. & Lab. Rel. Rev. 342, 343 (1980).

³²⁸ KNOWING EMPLOYMENT, *supra* note 3, at 220 (testimony of D. North); H.R. REP. NO. 115.1, *supra* note 87, at 96-97.

³²⁹ See KNOWING EMPLOYMENT, *supra* note 3, at 98 (Chamber of Commerce citing a 1981 Government Accounting Office report).

³³⁰ See *id.* at 180 (testimony of M. Cooper, National Urban League). But see *infra* text accompanying notes 337-43.

³³¹ See H.R. REP. NO. 115.1, *supra* note 87, at 96 (29 million Americans were in low skill jobs in 1982 and in 1981, 20.5 million worked below, at, or very near the minimum wage). But see *infra* text accompanying notes 333-36.

³³² R. EHNNENBERG & R. SMITH, MODERN LABOR ECONOMICS: THEORY AND PUBLIC POLICY 290 (1982). A 1979 Labor Department estimate argued that unemployment under these circumstances would go from 6% to 3.7%. *Id.*

conditions as soon as illegals are unavailable ignores the reality of low-cost foreign competition.

Rather than taking jobs from legal workers, most undocumented aliens toil in a secondary labor market under exploitative conditions unacceptable to most legal workers. Detractors of sanctions point to expert testimony that undocumented aliens have displaced less than 100,000 legal workers³³³ and studies showing that there is no correlation between the number of undocumented aliens in a particular area and that region's unemployment rate.³³⁴ Roger Waldinger, of the Massachusetts Institute of Technology, has stated that this "segmentation" analysis rests on a view of the economy as highly stratified: "The incompatibility between the job characteristics of the low wage sector and the work orientation for the second generation [immigrants such as Blacks and Puerto Ricans] has made the low-wage sector dependent on a fresh source of migrant labor such as illegal aliens from Mexico."³³⁵ Faced with these realities, employers will choose from among three options: ignore sanctions, internalize the costs associated with upgrading working conditions to attract United States citizens, or move operations abroad.³³⁶

There is no question that employers may simply ignore employer sanction laws because of the advantages gained in exploiting aliens.³³⁷ For those employers already violating a host of minimum wage, Fair Labor Act, Occupational Safety and Health Act, and tax laws, the risk of increased potential liability can be easily accepted.³³⁸ Moreover, for the few employers who now comply with the law generally but do retain illegal aliens as employees, sanctions will encourage violations of the full range of workplace laws because an employer may feel he has nothing to lose.³³⁹ The sweatshops of the United States will simply go on as before.³⁴⁰

Alternatively, employers facing possible criminal prosecution will

³³³ See KNOWING EMPLOYMENT, *supra* note 3, at 53 (testimony of L. Fuchs).

³³⁴ *Id.* at 99 (testimony of the Chamber of Commerce). Here a Chamber of Commerce survey, using Labor Department and Immigration and Naturalization Service statistics, shows that sunbelt cities with large numbers of illegal aliens also maintain a low unemployment rate. *Id.* However, this could be more a function of a generally robust, sun belt economy. *Id.*

³³⁵ KNOWING EMPLOYMENT, *supra* note 3, at 158 (R. Waldinger paper).

³³⁶ See generally M. PIRE, THE "ILLEGAL ALIENS" DEBATE MISSES THE BOAT, WORKING PAPERS FOR A NEW SOCIETY 60-69 (1978) [hereinafter cited as PIRE]; 123 CONG. REC. H22725-22732 (July 13, 1977) (statement of Rep. Holtzman).

³³⁷ *Cf. infra* note 340.

³³⁸ See KNOWING EMPLOYMENT, *supra* note 3, at 162-63 (R. Waldinger).

³³⁹ *Id.*

³⁴⁰ See generally Serrin, *Combating Garment Sweatshops is an Almost Futile Task*, N.Y. Times, Oct. 13, 1983, at B1, col. 2; Buck, *The New Sweatshop: A Penny for Your Collar*, N.Y. Times, Jan. 29, 1979, at 42-46.

upgrade their facilities and benefits and thereby attract legal workers. Instead of internalizing the cost of fines, employers will internalize the new labor cost. Eventually, these higher labor costs will be passed on to consumers in the form of higher prices.³⁴¹

But there will come a point where costs cannot be passed on to consumers without losing out to competition based in countries with low labor costs. Here a business will find it cost-effective to relocate in the Third World, taking with it the well paying jobs associated with the business.³⁴² On the other hand, United States service industry workers would, without illegal aliens and no foreign or machine competition, experience an increase in wages that would precipitate a return to providing services within the household.³⁴³ For example, high labor costs in the restaurant business would result in people eating out less.

Finally, whatever effect employer sanctions have on the "pull" of illegal immigration, the "push" of social, economic, and political slavery will remain in many countries. Being exploited in a "free" United States, the "land of opportunity," will continue to look like a viable alternative for many foreigners even if willing employers are harder to find. At least some commentators, however, have pointed out that "income differentials (between the United States and its neighbors) have existed without stimulating immigration."³⁴⁴ When no jobs exist aliens "return home."³⁴⁵ But the current flood of illegals into the United States in the midst of difficult economic times, when employment opportunities are limited for non-legal reasons, belie such rebuttal. Further, political freedom always draws immigrants to the United States no matter how limited job opportunities are.

It seems that any reform of the immigration laws must take into full account all the economic and political forces at work in causing illegal immigration.

V. ALTERNATIVES: A BETTER WAY TO TAKE ALICE OUT OF WONDERLAND

A. Alternatives to the Proposed Employer Sanctions

Detractors of employer sanctions have assembled a host of alternative methods for dealing with illegal immigration ranging from greater

³⁴¹ See KNOWING EMPLOYMENT, *supra* note 3, at 1.

³⁴² See *id.* at 150-51 (R. Waldinger paper); Buck, *supra* note 340, at 46.

³⁴³ KNOWING EMPLOYMENT, *supra* note 3, at 150 (R. Waldinger paper).

³⁴⁴ PIORE, *supra* note 336, at 62.

³⁴⁵ *Id.*

enforcement of existing laws to new legislation, including modified employer sanctions, to increased funding for Third World development.

Most opponents of the Simpson-Mazzoli bill, calling employer sanctions both divisive and questionable in effect, have proposed increased enforcement of border controls and workplace related laws.³⁴⁶ Specifically, increased funding for and greater diligence by the Immigration and Naturalization Service, Labor Department, Occupational Safety and Health Administration and Internal Revenue Service could decrease the level of exploitation currently associated with undocumented workers. If employers had to pay all undocumented workers the minimum wage, observe applicable safety regulations, and pay all social security and unemployment taxes, the illegal aliens would cease to be "bargain labor" capable of undercutting United States citizens. Of course the employers might not be able to compete in world markets without cheap illegal labor. This proposal's effectiveness also largely depends on undocumented aliens' forming a secondary labor market operating under exploitative conditions. If employers of illegal aliens already comply with all current laws, then increased enforcement will have no effect on illegal immigration because illegals are hired for reasons other than easy exploitation, such as their diligent work habits.³⁴⁷

One of the alternative's major benefits is the absence of increased discrimination against Hispanic Americans. Employers will have no incentive to avoid hiring "foreign looking" applicants who might be illegal aliens who might subject the employer to sanctions. This alternative also avoids the sanctions' potential, noted earlier,³⁴⁸ for increasing the number of workplace violations and therefore the government's enforcement burden because employers will have "nothing to lose" in violating other workplace laws because they are already liable for employing illegals.³⁴⁹

Another existing law that lends itself to decreasing illegal immigration is that of requiring the Department of Health and Human Services to verify the legal working status and identity of applicants for a social security card.³⁵⁰ Penalties ensue for giving false documentation for the application.³⁵¹ While the Immigration and Naturalization Service does not believe that re-issuing social security cards is appropriate, the agency is working with the Social Security Administration to use this avenue to

³⁴⁶ *E.g.*, KNOWING EMPLOYMENT, *supra* note 3, at 42-43 (testimony of Sen. Kennedy).

³⁴⁷ *See supra* note 329.

³⁴⁸ *See supra* note 339.

³⁴⁹ *Id.*

³⁵⁰ 42 U.S.C. § 405(c)(2)(B) (1982).

³⁵¹ 42 U.S.C. § 408(f) (1976).

screen out illegal aliens whose potential employers require social security numbers from workers.³⁵²

Another alternative to employer sanctions is the Department of Labor's Employers of Undocumented Workers Program, which targets certain employers for wage law violations and has recovered \$3.7 million since 1978.³⁵³ While its effectiveness has been questioned by the Government Accounting Office, others defend it and suggest that reforms of the program involving cooperation with the Immigration and Naturalization Service could make the program even more effective.³⁵⁴ In particular, the Labor Department might encourage "tips" from illegal alien informers promising to keep their names from the Immigration and Naturalization Service.³⁵⁵

The present Reagan Administration would seem particularly open to a free market strategy to control illegal immigration. This strategy could take a variety of forms. At one end, there is no "illegal immigration problem." The law of supply (of cheap labor) and demand (for cheap labor) should be respected. America as a whole will become more competitive in the world market and consumers will have to pay less for goods if unrestricted immigration is allowed. The effect of uncontrolled illegal immigration on United State's culture and citizens with few skills, however, is probably unpalatable to the majority of voters in the United States.

While the author of this Comment believes that certain alternatives listed above should receive consideration, especially enforcing existing workplace laws on safety and minimum wages, he subscribes first and foremost to reform that recognizes the segmentation of the United State's economy and that protects the civil liberties of aliens and Hispanic Americans.

First, the Immigration and Naturalization Service needs reform. The Immigration and Naturalization Service should streamline its operations and reduce processing delays by increasing automation.³⁵⁶ The Service should put greater emphasis on enforcing the law in a nondiscriminatory manner and avoid targeting Hispanics.³⁵⁷ It should

³⁵² KNOWING EMPLOYMENT, *supra* note 3, at 14-16 (statement of Immigration and Naturalization Service).

³⁵³ KNOWING EMPLOYMENT—ALT. PERSP., *supra* note 54, at 353-366.

³⁵⁴ *Id.*

³⁵⁵ *Id.*

³⁵⁶ FINAL REPORT HEARINGS, *supra* note 302, at 158-159. The delay in obtaining legal admission to the United States is a major reason for illegal immigration because many refuse to wait. Buck, *supra* note 340, at 44.

³⁵⁷ FINAL REPORT HEARINGS, *supra* note 302, at 158-59.

increase its efforts to single out major employers of illegal aliens who compete with legal workers and place less emphasis on service workers in undesirable jobs.³⁵⁸ This way jobs most attractive to legal workers will become available. Smugglers of illegal aliens should also be more fully targeted for penalties.³⁵⁹ Legal and illegal aliens in high level, well paying jobs should be targeted for deportation.³⁶⁰ In sum, the Service should respect segmentation of the United State's labor market where appropriate lest the jobs that illegals are forced out of not be filled by legal workers, who have higher expectations as to what constitutes a suitable job opportunity.

Recognizing the United State's secondary labor market, this Comment's author and others consider appropriate increases in guestworker programs³⁶¹ and increasing legal immigration levels beyond Simpson-Mazzoli figures³⁶² to meet the need for low skilled and seasonal labor.

In order to increase the lure of legal immigration over illegal immigration and also to decrease the exploitation of legal resident aliens, the author and other commentators advocate amending § 1981 of the Civil Rights Act of 1870 to prohibit discrimination based on citizenship.³⁶³ This would not make discrimination against undocumented aliens illegal. Section 1981 would provide a better vehicle to protect documented aliens than Title VII of the Civil Rights Act of 1964 because there is some case law to support inclusion of resident aliens in § 1981.³⁶⁴ In addition, § 1981 covers employment *and* contracting,³⁶⁵ provides immediate access to the courts without administrative remedies,³⁶⁶ incorporates more

³⁵⁸ *PIORE, supra* note 336, at 63-67.

³⁵⁹ *KNOWING EMPLOYMENT — DISCR., supra* note 224, at 314. The Immigration and Naturalization Service recently ran an undercover operation where illegals, after learning of "job opportunities" through a phony service set up by the INS, are allowed to cross the border only to be caught by INS officials and pressured to testify against the smugglers. *U.S. Hooks Smugglers, Aliens with Phony Jobs*, Chicago Tribune, Feb. 3, 1984, § 1, at 15, col. 1.

³⁶⁰ *PIORE, supra* note 336, at 46.

³⁶¹ *KNOWING EMPLOYMENT, supra* note 3, 109-112 (testimony of R. Thompson, Chamber of Commerce); *but see* *FINAL REPORT HEARINGS, supra* note 302, at 154-156. The H-2 program allows the temporary entry of foreign workers to perform seasonal work. H-2 workers are certified by the Department of Labor when it is determined that American workers will not be adversely affected by their entry. *Id.* at 61-65. The Simpson-Mazzoli bills provide an additional transitional agricultural worker program for the first three years after the bill's enactment. *Id.* at 75.

³⁶² *FINAL REPORT HEARINGS, supra* note 302, at 157. For instance, the bill increases the number of visas for colonies from 600 to 3,000. H.R. REP. NO. 115.1, *supra* note 87.

³⁶³ *Smith & Mendez, supra* note 118, at 24-28.

³⁶⁴ *Id.*

³⁶⁵ *Id.* at 27. 42 U.S.C. § 1980 (1982) provides immediate access to federal court, back pay awards beyond two years, and punitive and compensatory damages for mental anguish.

³⁶⁶ 42 U.S.C. § 1981 (1982).

liberal remedies³⁶⁷ and a longer statute of limitations.³⁶⁸ One drawback of giving legal immigrants greater protections might be that employers may choose to hire only undocumented workers and not legal aliens if the latter can bring discrimination suits.

Moreover, the author and others believe that employees subject to unfair labor practices should receive National Labor Relations Board ordered reinstatement that is conditioned on their legal work status.³⁶⁹ But Congress should also legislate out of existence the Supreme Court's reversal of the Court of Appeals back-pay and reinstatement remedy in *Sure-Tan*.³⁷⁰ Only meaningful reinstatement and back pay awards will ensure that workplace violations are reported by undocumented workers who prize their jobs, and provide penalties adequate to discourage unfair labor practices, thus decreasing exploitation of illegal aliens and so decreasing their appeal to employers.³⁷¹

Lastly, some critics of the Simpson-Mazzoli bill³⁷² along with this Comment's author, have their own version of employer sanctions.³⁷³ This version would eliminate the Texas proviso or add to the Immigration and Nationality Act a prohibition against the knowing employment of illegal aliens.³⁷⁴ Only employers cited for hiring illegal aliens, however, would have to report new hirings to the government.³⁷⁵ No national identification system would be issued but rather a registration center would screen applicants and give a cited employer approval to hire.³⁷⁶ Non-cited employers would have no incentive to engage in "play it safe" discrimination³⁷⁷ against Hispanics because there could be no liability for hiring illegals at this stage, but would upgrade workplace wages and conditions to avoid being targeted for government inspection.³⁷⁸ Employers who could show that their labor needs were not met by legal labor or that labor would cost too much to stay competitive in world markets would have requirements lowered for wages and conditions and could use guest workers. Government efforts would focus on

³⁶⁷ *Id.*

³⁶⁸ *Id.*

³⁶⁹ Kutchins & Tweedy, *supra* note 44, at 361-62.

³⁷⁰ See *Sure-Tan, Inc.*, 104 S. Ct. at 2816-20 (Brennan, J. dissenting).

³⁷¹ *Id.*

³⁷² See *supra* text accompanying note 15.

³⁷³ See HOUSE 1983 HEARINGS, *supra* note 183, at 1069-70 (testimony of American Civil Liberties Union).

³⁷⁴ *Id.*

³⁷⁵ *Id.*

³⁷⁶ *Id.*

³⁷⁷ See *id.*; *supra* notes 225-26.

³⁷⁸ HOUSE 1983 HEARINGS, *supra* note 183, at 1070.

known hirers of illegal aliens.³⁷⁹ The above proposal does not represent a radical departure from the Simpson-Mazzoli legislation but simply shifts all enforcement activity and liability on cited employers only. It thus limits a negative discriminatory overreaction by all employers. Such a plan also legislatively mandates a targeted, efficient approach to enforcement.

B. Areas for Future Inquiry

The reader should consider two additional suggestions for dealing with illegal immigration, although a full discussion of them is beyond the scope of this Comment. First, even proponents of employer sanctions recognize that "as long as there is an economic imbalance between the sending countries and the United States, the pressure to migrate to this country will continue."³⁸⁰ Proponents therefore call for the long-term commitments and bilateral cooperation needed to coordinate immigration law and relieve economic imbalances.³⁸¹ For some critics of employer sanctions this is the only remedy to an illegal immigration "problem" that is simply a world market phenomenon.³⁸²

A second option is to identify "enterprise zones" where few federal and state government taxes and minimum wage obligations would apply, and where government would provide special government training funds for workers. To participate in a zone, an employer would only need to employ a workforce of permanent resident aliens and Americans and avoid hiring illegals.

In any event, further study on the issue surrounding illegal immigration, and in particular undocumented aliens' impact on the United States economy, seems called for to assist policymakers in enacting immigration reform.³⁸³ Policymakers must get hard data on what jobs can only be filled with alien labor.

VI. CONCLUSION

Illegal immigration evokes strong emotions because it is tied to job security and xenophobia. But it requires solutions that go beyond these

³⁷⁹ See *id.* at 1069-70.

³⁸⁰ H. Rep. No. 115.1, *supra* note 87, at 47.

³⁸¹ KNOWING EMPLOYMENT — ALT. PERSP., *supra* note 54, at 348-51.

³⁸² See Worthington, *Trouble in a Labor Paradise: U.S. Plants in Mexico Lose Workers over Border*, Chicago Tribune, Oct. 2, 1983, § 1, at 21, col. 4. American owned "maquiladora" plants in Mexico, near the U.S. border, used to thrive and contribute to employment in a country with 50% unemployment while proving highly profitable for their owners. Now they are experiencing high turnover and losing employees to better paying service jobs across the border. *Id.*

³⁸³ See U.S.C. RTS. *supra* note 186, at 58 n.4.

influences to determine the negative and positive contributions illegal immigrants make to the United State's economy.

Several alternatives noted in Section V do just that³⁸⁴ and any solution to illegal immigration should generalize from them. First, legalizing the presence of undocumented immigrants in those segments of the economy that cannot find legal workers will leave government free to expel only illegal immigrants that truly take the jobs of United States citizens. Such sanctions promise to be more effective because they do not ask employers to choose between keeping their business open and breaking the law. Further, such an approach recognizes that there will always be a new generation of immigrants coming to and needed by the United States. Finally, sanctions should only apply to employers notified by the Immigration and Naturalization Service of the presence of illegals in well paying jobs. Only those employers would have the authority to check the citizenship of job applicants. The Immigration and Naturalization Service would oversee the citizenship inquiry, thus limiting any inducement to discriminate against Hispanics.

R. Paul Faxon

³⁸⁴ See *supra* text accompanying notes 356-79.